

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-7577

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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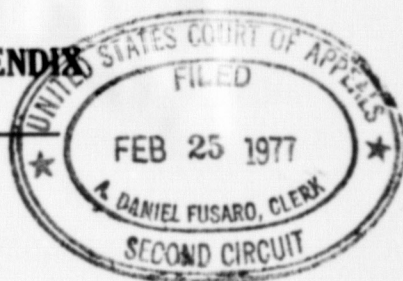
No. 76-7577

DONALD KATZ, Trustee in Bankruptcy of Oakland Foundry
Company of Belleville, Illinois, Inc.,
Plaintiff-Appellant,

vs.

FIRST NATIONAL BANK OF GILEN HEAD,
Defendant-Appellee.

JOINT APPENDIX



PAGINATION AS IN ORIGINAL COPY

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FOR THE SECOND CIRCUIT

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Company of Belleville, Illinois, Inc.,
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United States District Court
Eastern District of New York

| | | |
|--|--------------|-----------|
| Donald Katz, Trustee in Bankruptcy of Oakland Foundry Company of Belleville, Illinois, Inc., | } Plaintiff, | 73C-1051. |
| Against | | |
| First National Bank of Glen Head, | } Defendant. | |
| | | |

DOCKET ENTRIES

Date

Year Filings—Proceedings

1973

- | | |
|---------|--|
| July 13 | Clerk's order allowing personal service of summons & complaint filed. 1 JS5 |
| July 13 | Complaint filed—Summons issued. 2 |
| July 18 | Summons returned and filed/executed. 3 |
| Aug. 20 | Notice to take deposition of Donald Katz filed. 4 |
| Aug. 20 | Answer of the First National Bank of Glen Head with demand for jury trial filed. 5 |
| Aug. 28 | Interrogatories of Defendant filed. 6 |
| Aug. 28 | Defendant's request for Pltff's to produce documents filed 7 |
| Sept. 5 | By Travia J. Order dated 9-5-73 extending time to take Deposition of Donald Katz to 9-14-73 filed. 8 |

- Sept. 27 By Travia, J.—Order dtd 9-27-73 extending time for plttf to answer to defts first set of interrogatories to 10-24-73, etc. filed. 9
- Oct. 31 By Travia, J.—Order dated Oct. 30, 1973 filed extending time for the plttf. to answer the def't's first set of interrogatories to Nov. 26, 1973, etc. 10
- Dec. 4 By Travia, J.—Order dated 12/4/73 filed that the time for the plttf to answer the def't's first set of interrogatories dated Aug. 24, 1973, is extended from Nov. 26, 1973 to Dec. 26, 1973, etc. 11

1974

- Jan. 2 Answers of Plttf to def't's interrogatories filed. 12
- Jan. 5 Plttf's First Set of Interrogatories filed. 13
- Jan. 5 Plttf's Request for Production of Documents filed. 14
- May 28 By Travia, J.—Order dtd. 5-24-74 extending time for defts to answer first set of interrogatories to 5-30-74 & extending time of def't to respond to requests for documents to 5-30-74 filed. 15
- May 30 Def't's answers to interrogatories & response to request for production of documents filed. 16
- Aug. 14 Notice of Deposition and request for documents filed. 17
- Aug. 20 Def't's request for documents filed. 18
- Aug. 20 Def't's request for admissions filed. 19
- Aug. 20 Def't's interrogatories to plttf (second set) filed. 20
- Sept. 10 By Travia, J.—Order dtd 9-10-74 extending time of plttf to respond to def't's request for admissions to 10-24-74, etc. filed. 21

- Oct. 11 Notice to take deposition of Herman W. Brede
filed. 22
- Oct. 25 Pltff's answers to deft's interrogatories filed. 23
- Oct. 25 Response of pltff to request for admission filed. 24

1975

- Feb. 13 Deposition of pltff of 2-20-74 filed. (p/c mailed to
attys.) 25
- Apr. 6 Interrogatories of deft 1st National Bank filed. 26
- Apr. 25 Affidavit of James J. Gile filed. 27
- Apr. 29 By Bramwell, J.—Order dtd 4-28-75 extending time
of pltff to answer deft's third set of interrogatories
filed. 28
- May 8 Change of address of atty for pltff filed. 29
- May 24 Answers to Interrogatories (Third Set) filed. 30

1976

- Apr. 22 Before Bramwell, J.—Case called for status report
and adjd 6-25-76 on consent.
- June 24 Notice of motion ret. 7-23-76 with memo of law
and affidavit and affidavit of service of mail for
summary judgment dismissing the complaint filed.
(31 thru 34)
- July 23 By Pratt, J.—Order adjd conf from 7-14-76 to
7-23-76, defts motion for summary judgment adjd
to 10-1-76 etc., filed. (35)
- July 23 Before Pratt, J.—Case called to dismiss and adjd
to 10-1-76 for motion for summary judgment.

- Sept. 13 Statement of material facts as to which is contended that there exists a genuine issue of fact filed. (36)
- Sept. 13 Pltff's memorandum in opposition to motion to dismiss filed. (37)
- Sept. 13 Affidavit in opposition to motion to dismiss filed. (38)
- Sept. 14 Notice of motion ret. 9-24-76 filed. (39)
- Sept. 29 Reply memo in support of deft's motion for order granting summary judgment filed. (40)
- Oct. 1 Before Pratt, J.—Case called for motion to dismiss. Motion argued and decision reserved.
- Oct. 22 By Pratt, J.—Memo & Order dtd 10-19-76 granting summary judgment in favor of the deft dismissing the complaint filed. Copies mailed. (41)
- Oct. 22 Judgment that the pltff take nothing of the deft and that the defts' motion for summary judgment is granted and the complaint dismissed filed. 42
- Nov. 19 Notice of appeal filed by pltff filed. 43
- Dec. 1 Civil appeal scheduling order filed. 44
- Dec. 22 Above record certified and mailed to the C of A. cg

2

**COMPLAINT IN ACTION TO
RECOVER PREFERENCE**

(Filed July 13, 1973)

Plaintiff, Donald Katz, as Trustee in Bankruptcy of Oakland Foundry Company of Belleville, Illinois, Inc., by his attorneys,

Arthur J. Ginsburg and Joel A. Kunin, for his complaint against the defendant herein, alleges as follows:

1. This suit arises under the provisions of the Bankruptcy Act, Title 11 U.S.C., and is brought to recover a preference under Section 60(b), 11 U.S.C. § 96, of the Bankruptcy Act. The jurisdiction of this Court is based upon the aforesaid provision of the Bankruptcy Act and Title 28, United States Code, Section 1332. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars (\$10,000).

2. At all times pertinent hereto, plaintiff was and still is a citizen of the State of Illinois.

3. Upon information and belief, at all times pertinent hereto, defendant First National Bank of Glen Head ("Glen Head") was and still is a bank organized and operating under the laws of the United States and has its principal place of business in the State of New York, within the Eastern District of New York.

4. On or about July 15, 1971, an involuntary bankruptcy petition was filed against Oakland Foundry Company of Belleville, Illinois, Inc., a corporation organized under the laws of the State of Illinois ("Oakland").

5. On or about August 18, 1971, Oakland was adjudicated a bankrupt by the United States District Court for the Eastern District of Illinois.

6. On or about October 12, 1971, plaintiff was duly appointed Trustee of the bankrupt, Oakland, by the Bankruptcy Court for the Eastern District of Illinois. Plaintiff is duly qualified to act as Trustee for Oakland, is presently acting as Trustee for the estate of Oakland and has been expressly authorized to prosecute this action.

7. On and prior to July 1, 1970, and until August 18, 1971, Oakland used the St. Clair National Bank of Belleville, Illinois, as its banking institution for the purposes of making its deposits of accounts receivable, for the payment of its payables and its payrolls and for other normal banking business in the regular course of its business.

8. Upon information and belief, within four months prior to the filing of the involuntary petition of this bankruptcy, Oakland, while insolvent and indebted to the defendant and divers other creditors of the same class, upon unsecured indebtedness, provable in bankruptcy, made a transfer of portions of its property to the defendant by depositing in its account at Glen Head, the sum of One Hundred Eight Thousand Seven Hundred Thirty-two and 07/100 Dollars (\$108,732.07) on account of an antecedent debt.

9. Upon information and belief, the said deposits and transfers made to the defendant were not made or accepted in the regular course of business or in good faith, but were made and accepted for the fraudulent and unlawful purpose of building up a bank account with the defendant so as to permit it to set off the antecedent debt of the bankrupt, Oakland, and thereby obtain a greater percentage of its debt than other creditors of said debtor of the same class as defendant.

10. On or about June 30, 1971, within four months prior to the filing of the involuntary petition of this bankruptcy and while Oakland was insolvent, Glen Head caused Oakland to transfer its property to the defendant by setting off Oakland's bank account in the sum of One Hundred Eight Thousand Seven Hundred Eighty-three and 91/100 Dollars (\$108,783.91) on account of an antecedent debt, and said transfer did thus operate as a preference under the provisions of the Bankruptcy Act.

11. The effect of the aforesaid June 30, 1971 transfer enabled defendant to obtain a greater percentage of its debt than other creditors of Oakland of the same class as defendant.

12. Upon information and belief, at the time of the aforesaid June 30, 1971 transfer and during the period referred to in paragraph 8 herein, defendant knew or had reasonable cause to believe that Oakland was insolvent within the purview of the Bankruptcy Act.

Wherefore, plaintiff demands that the unlawful transfer be set aside and that judgment be entered against the defendant in the sum of One Hundred Eight Thousand Seven Hundred Eighty-three and 91/100 Dollars (\$108,783.91), with interest thereon from June 30, 1971, together with the costs and disbursements of this action.

Dated: New York, New York
July 13, 1973

**5 ANSWER OF THE FIRST NATIONAL BANK
OF GLEN HEAD AND DEMAND FOR
TRIAL BY JURY**

The First National Bank of Glen Head, defendant in the above entitled action, by its attorneys, Goldman, Horowitz & Chernow and Weil, Gotshal & Manges, answers the complaint herein as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraphs "1", "2", "4", "5", "6", "7" and "11" of the complaint herein.

2. Admits the allegations set forth in paragraph "3" of the complaint herein.

3. Denies each and every allegation set forth in paragraphs "8", "9" and "12" of the complaint herein.

4. Denies each and every allegation set forth in paragraph "10" of the complaint herein except denies knowledge or infor-

mation sufficient to form a belief as to the alleged insolvency of Oakland Foundry Co. of Belleville, Illinois, Inc. ("Oakland") on or about June 30, 1971 and admits that on or about said date, it set off monies in the account of the aforesaid bankrupt corporation in the sum of \$108,783.91 pursuant to its previous agreement with Oakland.

First Affirmative Defense

5. The complaint herein fails to state a cause of action upon which relief can be granted.

Second Affirmative Defense

6. All deposits made by Oakland with defendant were accepted in good faith and in the ordinary course of business, thereby entitling defendant to exercise its aforementioned right of set-off.

Demand for Trial by Jury

7. Defendant hereby demands a trial by jury in this action.

Wherefore, defendant respectfully requests judgment dismissing the complaint herein together with the costs and disbursements of this action.

Dated: New York, New York
August 3, 1973

6

INTERROGATORIES OF DEFENDANT

(First Set)

(Filed August 28, 1973)

Interrogatory No. 6

With respect to paragraph 8 of the complaint, state the exact date or dates when Oakland is alleged to have transferred its property to the Bank. Also state the source of the monies deposited with the Bank on the aforesaid date or dates.

* * * * *

Interrogatory No. 13

Describe fully the status of Oakland's business on and about June 30, 1971. Said description should include, but it is not limited to, a statement as to whether or not Oakland was operating its business in a normal manner, and a description of how Oakland's operations on or about June 30, 1971 differed from its normal manner of operations, if such was the case.

* * * * *

12

**ANSWERS OF PLAINTIFF TO
DEFENDANT'S INTERROGATORIES**

(First Set)

(Filed January 2, 1974)

* * * * *

6. Listed below are the dates and the sums deposited by the bankrupt into its account at the First National Bank of Glen Head:

| Date | Amount of Deposit |
|-------------|--------------------------|
| 4/20/71 | \$ 2,546.63 |
| 4/21/71 | 2,071.00 |
| 4/26/71 | 43,120.93 |
| 4/28/71 | 20,000.00 |
| 5/ 4/71 | 4,681.76 |
| 5/ 7/71 | 668.81 |
| 5/18/71 | 21,451.01 |
| 5/25/71 | 1,303.47 |
| 5/28/71 | 5,357.44 |
| 6/ 1/71 | 484.94 |
| 6/ 5/71 | 1,588.68 |
| 6/ 7/71 | 668.83 |
| 6/ 9/71 | 982.05 |
| 6/14/71 | 898.68 |
| 6/10/71 | 9.70 |
| 6/21/71 | 820.17 |
| 6/25/71 | 1,157.50 |
| 6/29/71 | 88.22 |
| 6/22/71 | 19.00 |
| 6/30/71 | 564.75 |
| 7/ 1/71 | 248.50 |

13. Prior to and on June 30, 1971, all plant operations had ceased. It is believed that the only employee of the company on that date was Herman Brede and his secretary, Nancy Woolford. Its normal operations included the manufacture and sale of oil, gas and wood stoves and compact kitchen type cabinets.

* * * * *

13

PLAINTIFF'S INTERROGATORIES

(First Set)

(Filed January 5, 1974)

Interrogatory Number 3

With respect to the denial of paragraph 8 of the complaint set forth in paragraph 3 of defendant's answer, state.

* * * * *

(n) The types of obligations paid from the Bankrupt's account with the defendant;

(o) Whether defendant was aware of the source of the monies deposited in said account, and, if so, state the extent of its knowledge;

* * * * *

16 **ANSWERS OF DEFENDANT TO PLAINTIFF'S
INTERROGATORIES**

(First Set)

(Filed May 30, 1974)

3. * * *

(n) Not within the knowledge of the defendant.

(o) Defendant was not aware of the source of the moneys deposited in said account.

* * * * *

19 **REQUEST FOR ADMISSIONS PURSUANT
TO FEDERAL RULE OF CIVIL
PROCEDURE 36**

(Filed August 20, 1974)

Defendant, First National Bank of Glen Head, by its attorneys, Goldman, Horowitz & Chernov and Weil, Gotshal and Manges, requests that, within thirty (30) days after service of this request, plaintiff make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at trial:

* * * * *

2. That each of the checks listed on Exhibit "B" annexed hereto were drawn on Oakland's account at the First National Bank of Glen Head (Account No. 01-7-2585-8) (the "Glen Head account"). List any check which you assert was not drawn on the Glen Head account.

3. That with respect to each of the checks listed on Exhibit "B" (a) the name listed under the column headed "PAYEE" is the payee of the said check; (b) the date of the check is the date listed under the column headed "DATE"; and (c) that the check was drawn in the amount listed under the column headed "AMOUNT"; and (d) that the number of the check is the number under the column headed "CHECK NO." If you contend that any of the aforesaid entries are inaccurate, specify the inaccuracy.

4. That from January 6, 1970 through April 15, 1971 at least 260 checks were drawn on the Glen Head account.

5. That from January 6, 1970 through October 1, 1971 only six (6) checks were drawn to the order of the First National Bank of Glen Head on the Glen Head account.

6. That checks Nos. 1556, 1623, 1639, 1717, 1730 and 1759 were drawn to the order of First National Bank of Glen Head, but that the purpose for which said checks were drawn according to the description listed on the carbon copy of each check which is in your possession was for payment of Federal Taxes, "Fed. Taxes" FUTA, "F.I.C.A." and/or "Fed. Tax Held."

7. That to the best of your knowledge, information and belief, the checks referred to in Paragraph "6" *supra*, were used to pay various tax obligations of Oakland, including, but not limited to, those imposed by Subtitle "C" of the Internal Revenue Code, 26 U.S.C. §§ 3101 *et seq.*

Dated: New York, New York
August 8, 1974.

20 **INTERROGATORIES OF DEFENDANT**

(Second Set)

(Filed August 20, 1974)

* * * * *

Interrogatory No. 12

State whether the allegations made in paragraph 7 of the complaint were based on any source other than your examination of documents in your possession. If such allegation is supported by any other sources, identify the additional sources.

* * * * *

Interrogatory No. 26

Describe fully the extent to which the Bank had been informed of Oakland's financial condition prior to June 29, 1971.

Interrogatory No. 27

With respect to your answer to Interrogatory No. 13 of defendant's first set of interrogatories state the date when "all plant operations [of Oakland] ceased" and describe the factual basis of this statement. Also state what business, if any, Herman Brede and Nancy Wooford were engaged in after the close of Oakland's "plant operations".

* * * * *

**23 ANSWERS OF PLAINTIFF TO DEFENDANT'S
INTERROGATORIES**

(Second Set)

(Filed October 25, 1974)

* * * * *

12. Based upon examination of books and records and informal interviews with Nancy Woodford and Herman Brede.

* * * * *

26. Upon information and belief Herman Brede was in contact with defendant's officer prior to June 29, 1971 and advised them of Oakland's financial condition. Information is based upon informal discussions with Nancy Woodford and Herman Brede.

27. Oakland's plant operations ceased during the first quarter of 1971. During that period 46 employees were on Oakland's payroll. During the second quarter only office and sales personnel were on the payroll. Information was obtained from the tax returns filed by bankrupt.

* * * * *

**24 RESPONSE OF PLAINTIFF TO REQUEST
FOR ADMISSION**

(Filed October 25, 1974)

Donald Katz, Trustee, Plaintiff makes the following statement in response to request for admission pursuant to Federal Rule of Civil Procedure 36 served upon him by defendant dated August 8, 1974.

* * * * *

Request No. 2 through 7. He cannot truthfully admit or deny the matters set forth in Requests No. 2 through 7 for the reason that he is Trustee in bankruptcy of Oakland Foundry Company of Belleville, Illinois, Inc., and as such he is the custodian of the records referred to in Request 2 through 7. Therefore, he cannot attest to the accuracy of said books and records. He admits that the books and records in his custody reflect the transactions that defendant request him to admit but cannot truthfully state that such facts are true.

* * * * *

25

**DEPOSITION OF PLAINTIFF
DONALD KATZ**

(Filed February 13, 1975)

* * * * *

[71] A. Yes. As I said, I have to believe that a bank, a well-run bank, when it makes this type of a loan has to constantly check on the security for their loan.

[72] I also, and this didn't become apparent to me until much later, or a much later date than the original conversation, but when I was appointed receiver for Oakland Foundry—I am sorry. When I was appointed trustee for Oakland Foundry, there was an employee of the Foundry who was still there; I don't know why she stayed that long, to be honest with you, but she seemed to be a general office manager, and she told me just in passing when she left and I came that people from the bank had been talking with Mr. Brede for several months prior to the bankruptcy and they were very concerned about their loan. That's all.

Q. Do you know the name of that person? A. I know what her name was.

Mr. Ginzburg: Which person are you speaking of?

Q. I am speaking of the person who conveyed this information to you. A. Yes. She was an office manager, I think that was her title, and her name was Nancy Wolford, W-o-l-f-o-r-d.

* * * * *

**26 INTERROGATORIES OF DEFENDANT, FIRST
NATIONAL BANK OF GLEN HEAD,
TO PLAINTIFF [Third Set]**

(Filed March 26, 1975)

To: Plaintiff Donald Katz:

Defendant, First National Bank of Glen Head (the "Bank"), requests that, within thirty (30) days after service, plaintiff answer the following interrogatories separately and fully in writing, and under oath in accordance with Rule 33 of the Federal Rules of Civil Procedure.

In answering these interrogatories, even though the question may be addressed to "you", furnish all information which is available to you, including information in the possession of your attorneys or investigators for your attorneys, and not merely such information known of your own knowledge. If you cannot answer the following interrogatories in full after exercising due diligence to secure the information to do so, so state and answer to the extent possible, specifying your inability to answer the remainder and stating whatever information or knowledge you have concerning the unanswered portion.

The interrogatories which follow must be regarded as continuing; and you are requested to provide, by way of supple-

mentary answers thereto, such additional information as you, or any other person in your behalf, may hereafter obtain, which will augment or otherwise modify your answers now given to the interrogatories below. Such supplementary answers are to be filed and served upon counsel for the Bank within thirty (30) days within receipt of such information, but not later than two (2) weeks preceding the date of the trial of this action.

Interrogatory No. 1

With respect to your answer to Interrogatory No. 5 of the Bank's second set of interrogatories, state the date when the complaint against Herman Brede and Betty Brede was filed with the United States District Court for the Eastern District of Illinois. Describe fully all efforts made by you to locate the Bredes prior to and subsequent to the filing of the aforesaid complaint. Also, state whether or not your efforts to locate the Bredes are continuing.

Interrogatory No. 2

State the last known address for Herman Brede or Betty Brede and all temporary addresses used by either of them within the past five (5) years. Also state the date or dates of each stay at each of the aforesaid residences.

30 **ANSWERS OF PLAINTIFF TO DEFENDANT'S
INTERROGATORIES**

(Third Set)

(Filed May 24, 1975)

Comes now the plaintiff, Donald Katz, as Trustee in Bankruptcy of Oakland Foundry Company of Belleville, Illinois, Inc., and for his answers to interrogatories, states as follows:

1. The complaint was filed against Herman Brede and Betty Brede on August 17, 1973.

The following efforts were taken by the plaintiff and his attorneys to locate Herman Brede:

1. Conferences with and inquiries with Tom Groesch, former plant manager of OAKLAND (approximately every 6 months since June, 1973).

2. Letter to Postmaster, July 1973, attempting to ascertain current address of Herman Brede and Betty Brede.

3. Search of phone directories.

4. Attempted service of summons by United States Marshal in Donald Katz et al. v. Herman Brede (August, 1973).

5. Phone calls to the Bredes' last known address in Upper Brookville, New York.

6. Letter addressed to Herman Brede's last known address in Upper Brookville, New York.

7. Phone calls to attempt to reach Nancy Woodford, Mr. Herman Brede's former secretary.

8. Phone calls to Arthur Hirschberg, Mr. Brede's former accountant.

9. Phone calls to Sylvia Kessler, former secretary to the bankrupt.

10. Attempted service of a deposition subpoena for Herman Brede on or about October 16, 1974.

11. Phone calls in attempt to reach Betty Brede.

12. Conferences with representatives of the Small Business Administration, the United States Attorney's Office, and Federal Bureau of Investigation.

We are still attempting to locate Mr. Herman Brede with the help of the Federal Bureau of Investigation, who is conducting an investigation of Mr. Brede's activities. Betty Brede is deceased.

2. The last known and only address known of Herman Brede and Betty Brede:

(a) P.O. Box 278, Oyster Bay, New York.

(b) No. 7 Donna Drive, Upper Brookville, L.I., N.Y.

(c) 689 Glenn Cove Road, Glen Head, New York. (May be business address.)

Dates of the above addresses are unknown.

STATEMENT

**31 Of Material Facts Under Rule 9(g) in Support of
Defendant's Motion for Summary Judgment
Under Fed. R. Civ. P. 56**

The First National Bank of Glen Head (the "Bank"), defendant herein, submits that there is no genuine issue to be tried with respect to the following material facts:

I. The Loan and Its Renewals

1. On or about January 16, 1969, in consideration of a loan from the Bank in the amount of \$125,000, Oakland Foundry of Belleville, Illinois, Inc. ("Oakland") executed a promissory note in favor of the Bank for the sum of \$125,000. The promissory note matured on April 16, 1969 and was thereafter renewed quarterly until June 18, 1970, when Oakland's obligation was made payable on demand. Affidavit of Anthony D. Famighetti, ¶ 2, Exhibit A ("Affidavit"), sworn to June 23, 1976.

2. Electronic Cabinets, Inc., Herman Brede and his wife, Betty D. Brede, guaranteed Oakland's indebtedness to the Bank. Affidavit, Exhibit B. The Bank ordinarily required a personal guaranty on a corporate borrowing by a small, individually held corporation such as Oakland. Without a personal guaranty, the Bank would not have made the loan to Oakland. Affidavit, ¶ 3.

3. In addition, Oakland secured its indebtedness and the guarantors secured their obligation by pledging with the Bank all of the stock of Electronic Cabinets, Inc. and H. W. Brede Co., Inc., Affidavit ¶ 4; Transcript of Testimony of Herman W. Brede,* October 12, 1971 ("Brede Testimony"), at 7.

* A certified copy of the transcript is annexed to the Affidavit as Exhibit C.

4. Oakland was a wholly-owned subsidiary of Electronic Cabinets, Inc., and Mr. and Mrs. Brede were the sole stockholders of Electronic Cabinets, Inc. and of H. W. Brede Co., Inc. Brede Testimony, at 14-15. Mr. Brede was the president and chief executive officer of Oakland. Brede Testimony, at 5.

5. On June 18, 1970, at the time the parties converted Oakland's promissory note to a demand note, Mr. and Mrs. Brede gave the Bank additional security in the form of a second mortgage on their residence. Affidavit ¶ 6, Exhibit D.

6. At the time of the Bank's loan to Oakland, Oakland opened a general checking account with the Bank (the "Glen Head Account"). Affidavit, ¶ 7, Exhibits E and F. The Glen Head account was a general account, and there were no restrictions on Oakland's right to make withdrawals. Affidavit ¶ 7.

7. Oakland maintained accounts at the St. Clair National Bank of Belleville, Illinois (the "St. Clair Account") and the Trade Bank & Trust Company of New York. Affidavit ¶ 8; Brede Testimony, at 8-9.

II. The Glen Head Account

8. Oakland deposited its funds into the Glen Head Account and the St. Clair Account, but beginning in March 1971, Oakland deposited more money into the Glen Head account "because several of the creditors [of Oakland] were trying to attach the funds in [the] St. Clair [Account]". Brede Testimony, at 9. Beginning in March of 1971, Oakland ceased making payments on its accounts payable. Brede Testimony, at 9.

9. Oakland used the Glen Head Account in the normal course of its business, paying its accounts payable on a regular basis from that account. Brede Testimony, at 9. From January 6, 1970 until April 15, 1971, "at least 260 checks" were drawn

on the account, and from January 6, 1970 until October 1, 1970, only six of these checks were made payable to the Bank, and these were for federal taxes. Plaintiff's Response Nos. 4, 5 and 6 to Request for Admissions.

10. The balance in the Glen Head Account fluctuated, but deposits were made on a regular basis. Affidavit ¶ 11, Exhibit G.

11. Oakland made deposits in the total amount of \$47,738.56 in April of 1971, \$48,105.05 in May of 1971, and \$12,075.21 in June of 1971. Affidavit, Exhibit H.

III. The Set-off

12. In "June or July", Herman W. Brede, President of Oakland, telephoned Anthony D. Famighetti at the Bank in order to advise that Oakland was in "financial trouble". In that conversation, Mr. Brede stated that he "was going to talk to the other creditors to tell them that [he] was in trouble . . . [and] was still trying to work [his] way out of it." Brede Testimony, at 10-12.

13. The foregoing conversation between Mr. Brede and Mr. Famighetti, then the Bank's President (now Chairman of the Board and Chief Executive Officer), occurred on June 29, 1971. Affidavit ¶ 14, Exhibit I.

14. As a result of the conversation between Mr. Brede and Mr. Famighetti on June 29, 1971, the Bank, on June 30, 1971, set-off Oakland's funds in the Glen Head Account on June 30, 1971, which totalled \$108,783.91. These funds were applied against Oakland's indebtedness to the Bank in the amount of \$125,000.00. Affidavit, ¶ 15, Exhibits J and K.

IV. The Ensuing Bankruptcy

15. On July 15, 1971, an involuntary petition in bankruptcy was filed against Oakland in the United States District Court for the Eastern District of Illinois. Plaintiff's Answers to Defendant's Interrogatory No. 1. Subsequently, Oakland was adjudged bankrupt on August 18, 1971. Complaint, ¶ 5.

16. Donald Katz, the plaintiff herein, was appointed trustee in bankruptcy for the Oakland estate on or about October 12, 1971. Complaint ¶ 6.

17. On October 12, 1971, counsel (now counsel to the trustee) for the receiver (now trustee) of the Oakland estate examined Mr. Brede, Oakland's President, in the bankruptcy court, under oath pursuant to Section 7a(10) of the Bankruptcy Act, 11 U. S. C. § 25(10).

Dated: New York, New York
June 15, 1976

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AFFIDAVIT

In Support of Defendant's Motion for Summary Judgment Under Fed. R. Civ. P. 56

(Filed June 24, 1976)

State of New York }
County of New York } ss.

Anthony D. Famighetti, being duly sworn, deposes and says:

1. I am chairman of the board and chief executive officer of The First National Bank of Glen Head (the "Bank"). I have personal knowledge of the facts hereinafter set forth, and submit this affidavit in support of the Bank's motion for summary judgment dismissing the complaint herein.

I. The Loan and Its Renewals

2. On or about January 16, 1969, in consideration of a loan from the Bank in the amount of \$125,000, Oakland Foundry of Belleville, Illinois, Inc. ("Oakland") executed a promissory note in favor of the Bank for the sum of \$125,000. The promissory note matured on April 16, 1969, and was thereafter renewed quarterly until June 18, 1970, when Oakland's obligation was made payable on demand. Evidence of Oakland's indebtedness is annexed hereto as Exhibit A.*

3. Electronic Cabinets, Inc., Herman W. Brede and his wife, Betty D. Brede, guaranteed Oakland's indebtedness to the Bank. Copies of all of the guaranty instruments are attached hereto collectively as Exhibit B. The Bank ordinarily required a personal guaranty on a corporate borrowing by a small, individually held corporation such as Oakland. Without a personal guaranty, the Bank would not have made the loan to Oakland.

4. In addition, Oakland secured its indebtedness to the Bank and the guarantors secured their guaranty obligation by pledging all of the stock of Electronic Cabinets, Inc. and of H.W. Brede Co., Inc. Transcript of Testimony of Herman W. Brede, October 12, 1971, at 7 ("Brede Testimony"). A certified copy of the Brede Testimony is attached hereto as Exhibit C.**

5. Upon information and belief, Oakland was a wholly-owned subsidiary of Electronic Cabinets, Inc. Mr. & Mrs. Brede were the sole stockholders of Electronic Cabinets, Inc. and of H.W. Brede Co., Inc. Brede Testimony, at 14-15. Mr. Brede was president and chief executive officer of Oakland. Brede Testimony, at 5.

* All exhibits to this affidavit may be found in the supplemental volume of exhibits, with the exception of Exhibit C, reproduced immediately following the deposition of Anthony D. Famighetti herein.

** Counsel for the Bank obtained the transcript of the Brede Testimony from plaintiff by means of pre-trial discovery.

6. On June 18, 1970, when Oakland's obligation to the Bank became evidenced by a demand note rather than a promissory note, Mr. & Mrs. Brede gave the Bank additional security in the form of a second mortgage on their residence. Copies of the second mortgage and related documents are attached hereto collectively as Exhibit D.

7. At the time of the Bank's loan to Oakland, Oakland opened a general checking account with the Bank (the "Glen Head Account"). Copies of the signature card and the initial checking account statement are attached hereto as Exhibits E and F respectively. The Bank normally required a small commercial borrower such as Oakland to open a checking account after the Bank made a loan to it.

8. Upon information and belief, Oakland also maintained general checking accounts at the St. Clair National Bank of Belleville, Illinois (the "St. Clair Account") and the Trade Bank & Trust Company of New York. Brede Testimony, at 8-9.

II. The Glen Head Account

9. The Glen Head account was a general account, and there were no restrictions on Oakland's right to make withdrawals. Oakland deposited its funds into the Glen Head Account and the St. Clair Account, but beginning in March of 1971, Oakland deposited more of its funds into the Glen Head Account "because several of the creditors [of Oakland] were trying to attach the funds in [the] St. Clair [Account]."* Brede Testimony, at 9. Beginning in March of 1971, Oakland ceased making payments on its accounts payable. Brede Testimony, at 9.

* Apparently, as its corporate name suggests, Oakland's creditors were located in Illinois and were attempting to seize its assets there. By depositing its funds in the Glen Head Account, Oakland obtained limited protection for its working capital.

10. Oakland used the Glen Head Account in the normal course of its business, paying its accounts payable on a regular basis from that account. Brede Testimony at 9. In fact, from January 6, 1970 until April 15, 1971, "at least 260 checks" were drawn on the account, and from January 6, 1970 until October 1, 1970, only six of these checks were made payable to the Bank, and these were for federal taxes. Plaintiff's Response Nos. 4, 5 and 6 to Request for Admissions.

11. The balance in the Glen Head Account fluctuated, but deposits were made on a regular basis. In July of 1969, for example, there were deposits of \$18,012.05; the account opened that month with a balance of \$11,638.84, but ended the month with a balance of \$24,929.68. In August of 1969, there were deposits of \$33,511.23, and the balance at the end of the month was \$24,185.44. In September of 1969, there were deposits of \$34,439.39, and the balance at the end of the month was \$16,950.54. A similar pattern of activity continued until October of 1970. From October 1970 through March 1971, the account was less active and had lower balances. Copies of the monthly checking account statements of Oakland are attached hereto collectively as Exhibit G.

12. Oakland made deposits in the total amount of \$47,738.56 during April of 1971, \$48,105.05 in May of 1971 and \$12,075.21 in June of 1971. Copies of the checking account statements for the months of April, May and June are attached hereto as Exhibit H.

III. The Set-Off

13. According to the Brede Testimony, in "June or July", Herman W. Brede, president of Oakland, telephoned the Bank in order to tell me that Oakland was in "financial trouble." During that conversation, Mr. Brede stated that he "was going to talk to the other creditors to tell them that [he] was in trouble

... [and] was still trying to work [his] way out of it." Brede Testimony, at 10-12.

14. According to the Bank's records, the foregoing conversation between Mr. Brede and me occurred on June 29, 1971. A copy of my memorandum of the conversation, made at the time thereof, is attached hereto as Exhibit I.

15. As a result of my conversation with Mr. Brede on June 29, 1971, I caused the Bank, on June 30, 1971, to setoff Oakland's funds in the Glen Head Account, which totalled \$108,-783.91, against Oakland's indebtedness to the Bank in the sum of \$125,000.00. Copies of Oakland's checking account statement for June of 1971 and of the Bank's liability ledger are attached hereto as Exhibits J and K respectively.

IV. The Ensuing Bankruptcy

16. On July 15, 1971, an involuntary petition in bankruptcy was filed against Oakland in the United States District Court for the Eastern District of Illinois. Plaintiff's Answers to Defendant's Interrogatory, No. 1. Subsequently, Oakland was adjudged bankrupt on August 18, 1971. Complaint, ¶5.

17. As the Brede Testimony reflects, on October 12, 1971, counsel (now counsel to the trustee) for the receiver (now trustee) of the Oakland estate examined Mr. Brede, Oakland's president, in the bankruptcy court, under oath pursuant to Section 7a(10) of the Bankruptcy Act, 11 U.S.C. §25(10). In response to questioning by counsel, Mr. Brede explained Oakland's handling of the Glen Head Account. Brede Testimony, at 9.

18. The foregoing incontrovertible facts demonstrate that the Bank accepted Oakland's funds in good faith and in the

ordinary course of business. Accordingly, the Bank's set-off on June 30, 1971 was entirely proper.*

/s/ ANTHONY D. FAMIGHETTI

Sworn before me on the 23rd day of June 1976.

/s/ HILDA M. ARASIM
Notary Public, State of New York
No. 30-4503138
Qualified in Nassau County
Commission Expires March 30, 1977

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STATEMENT

**Of Material Facts as to Which It Is Contended That
There Exists a Genuine Issue of Fact to Be Tried**

(Filed September 13, 1976)

Donald Katz as trustee in bankruptcy of Oakland Foundry Company of Belleville, Illinois, Inc. submits that there is a genuine issue of fact to be tried and that is to-wit:

Whether the deposits made by Bankrupt, Oakland Foundry Company of Belleville, Illinois, Inc., in the defendant, First National Bank of Glen Head, amounting to \$108,732.07 from April 20, 1971 to June 30, 1971 and within four months of bankruptcy were made in the "ordinary course of business" providing the bank with the right of set off, or whether they were outside the scope of regular course of business and, therefore, may be a preferential transfer.

* Copies of the pleadings are attached hereto collectively as Exhibit L.

1-7. Plaintiff does not dispute paragraphs 1 through 7 of defendant's Statement of Material Facts.

8. Plaintiff disputes paragraph 8 of defendant's Statement of Material Facts for the reason that while Brede testified "because several of the creditors (of Oakland) were trying to attach the funds in (the St. Clair Accounts)," there is no proof of such action, and further there were no legal means by which a creditor could have attached these funds; there were "no outstanding judgments." (Plaintiff's Answers No. 3 and No. 4 to Defendant's First Set of Interrogatories; also paragraph 8 of Affidavit of Joel A. Kunin). Further the Court could find since Brede had personally guaranteed the loan (paragraphs 3-6 of Defendant's Statement of Material Facts) the transfers of funds were for the purpose of reducing his personal liability and not for business purposes. Plaintiff agrees that beginning in March of 1971, Oakland Foundry Company of Belleville, Illinois, Inc. "substantially" ceased making payments on its accounts payable, although some payables were paid. Exhibits 1-3 of Joel A. Kunin's Affidavit.

9. Plaintiff disputes the first sentence of paragraph 9 of Defendant's Statement of Material Facts. The books and records of the bankrupt contradict the testimony of Brede and clearly demonstrate that with minor exception, all accounts receivable and payroll were paid by checks drawn on the St. Clair National Bank of Belleville, Illinois, and not First National Bank of Glen Head. Moreover, only eight checks, of which three were payable to First National Bank of Glen Head, were drawn on the account of First National Bank of Glen Head during the year preceding the bankruptcy (Plaintiff's Responses Nos. 4, 5 and 6 to Request for Admission) while approximately 850 checks were drawn on the regular account of Oakland Foundry Company of Belleville, Illinois, Inc. at the St. Clair National Bank. Exhibits 1 and 3 attached to Affidavit of Joel A. Kunin.

10. Plaintiff disagrees with paragraph 10 of Defendant's Statement of Material Facts, that deposits were made on a regular basis. (Furthermore, this is a conclusion rather than a statement of fact.)

11-18. Plaintiff does not dispute paragraphs 11 through 18 of Defendant's Statement of Material Fact.

Dated: East St. Louis, Illinois
September 10, 1976

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AFFIDAVIT

**In Opposition to Defendant's Motion for Summary
Judgment Under Fed. R. Civ. P. 56**

(Filed September 13, 1976)

State of Illinois }
County of St. Clair } ss.

Joel A. Kunin, being duly sworn, deposes and says:

1. I am an attorney licensed to practice law before the Supreme Court of the State of Illinois and as such am duly authorized to practice law within the State of Illinois. I have personal knowledge of the facts hereinafter set forth except as specifically indicated and then state that those facts so stated are made upon my best information and belief, and submit this Affidavit in support of plaintiff's objection to the granting of defendant's motion for Summary Judgment under Fed. R. Civ. P. 56.

2. On August 18, 1971, Oakland Foundry Company of Belleville, Illinois, Inc., was adjudicated a bankrupt in the United States District Court for the Eastern District of Illinois, in case No. BK 71-464. On said date Donald Katz was appointed Receiver of said bankrupt estate and thereafter on Oc-

tober 12, 1971 was appointed the Trustee of said bankrupt estate. Your affiant was duly authorized to act as attorney for said Receiver and thereafter authorized to act as attorney for said Trustee.

3. At the time Donald Katz was appointed Receiver I accompanied him to the vacated premises of the bankrupt, Oakland Foundry Company of Belleville, Illinois, Inc., in Belleville, Illinois, and together with said Receiver took possession of all books and records on the premises.

4. That the Exhibits hereinafter referred to were under my direction, supervision and control from the bankrupt's premises and brought to my office. That the books and records hereinafter referred to were business records of the bankrupt as defined by the Business Records Act, and would so be admissible in this proceeding at the trial of this matter.

5. That Exhibit "A", annexed hereto* is a complete collection of the bank statements received by the bankrupt, Oakland Foundry Company of Belleville, Illinois, Inc., from the St. Clair National Bank of Belleville, Illinois, in the regular course of business for the period of January, 1970, through May of 1971. The bank statement, for the month of June, could not be located. These statements reflect banking transactions conducted by Oakland Foundry Company of Belleville, Illinois, Inc., for that period of time. These statements are of an account known as the Regular Checking Account.

6. That Exhibit "B", annexed hereto is a complete collection of the bank statements received by the bankrupt, Oakland Foundry Company of Belleville, Illinois, Inc., from the St. Clair National Bank of Belleville, Illinois in the regular course of business for the period of January, 1970, through May of 1971. The bank statement, for the month of June, could not be located.

* All exhibits to this affidavit may be found in the supplemental volume of exhibits filed with this cause.

These statements reflect banking transactions conducted by Oakland Foundry Company of Belleville, Illinois, Inc., for that period of time. This account was known as the Payroll Checking Account.

7. Annexed hereto as Exhibit "C", are schedules found annexed to the bankrupt's check register (carbon copies of bankrupt's checks kept in numerical order), and were prepared by the employees of Oakland Foundry Company of Belleville, Illinois, Inc., for the purpose of maintaining the balances that Oakland Foundry Company had in their bank accounts at any given time.

8. That I caused a search to be made of the law records of lawsuits filed in St. Clair County against the bankrupt to determine whether there were outstanding judgments or lawsuits pending against Oakland Foundry Company of Belleville, Illinois, Inc., from January 1, 1971 through July of 1971. That the search disclosed that the only pending cause of action was L. C. Frick v. Oakland Foundry, No. 71-167, and judgment was rendered July 26, 1971. (After bankruptcy had been filed).

Two other suits were commenced in July, 1971, and there were no outstanding judgments against Oakland Foundry Company of Belleville, Illinois, Inc., prior to July 1, 1971.

/s/ JOEL A. KUNIN

Subscribed and sworn to before me this 10th day of September, 1976.

/s/ JACQUELINE RACENER
Notary Public

My Commission Expires: January 7, 1978.

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**MEMORANDUM AND ORDER OF
DISTRICT COURT**

(Filed October 22, 1976)

Pratt, J.

On June 30, 1971, defendant bank exercised its right of set-off against a checking account having a balance in favor of Oakland Foundry of Belleville, Illinois, Inc. in the amount of \$108,783.91. These funds were applied against Oakland's indebtedness to the bank in the amount of \$125,000. Fifteen days later, on July 15, 1971, an involuntary petition in bankruptcy was filed against Oakland in the United States District Court for the Eastern District of Illinois. Plaintiff seeks to invalidate that set-off as a voidable preference under 11 USC §96.

The following facts are undisputed, having been expressly asserted by defendant for purposes of the motion under local rule 9(g) and expressly admitted by plaintiff in his answering papers:

1. On or about January 16, 1969, in consideration of a loan from the Bank in the amount of \$125,000, Oakland Foundry of Belleville, Illinois, Inc. ("Oakland") executed a promissory note in favor of the Bank for the sum of \$125,000. The promissory note matured on April 16, 1969 and was thereafter renewed quarterly until June 18, 1970, when Oakland's obligation was made payable on demand. Affidavit of Anthony D. Famighetti, ¶2, Exhibit A ("Affidavit"), sworn to June 23, 1976.
2. Electronic Cabinets, Inc., Herman Brede and his wife, Betty D. Brede, guaranteed Oakland's indebtedness to the Bank. Affidavit, Exhibit B. The Bank ordinarily required a personal guaranty on a corporate borrowing by a small,

individually held corporation such as Oakland. Without a personal guaranty, the Bank would not have made the loan to Oakland. Affidavit, ¶3.

3. In addition, Oakland secured its indebtedness and the guarantors secured their obligation by pledging with the Bank all of the stock of Electronic Cabinets, Inc. and H. W. Brede Co., Inc. Affidavit ¶4; Transcript of Testimony of Herman W. Brede, October 12, 1971 ("Brede Testimony"), at 7.

4. Oakland was a wholly-owned subsidiary of Electronic Cabinets, Inc., and Mr. and Mrs. Brede were the sole stockholders of Electronic Cabinets, Inc. and of H. W. Brede Co., Inc. Brede Testimony, at 14-15. Mr. Brede was the president and chief executive officer of Oakland. Brede Testimony, at 5.

5. On June 18, 1970, at the time the parties converted Oakland's promissory note to a demand note, Mr. and Mrs. Brede gave the Bank additional security in the form of a second mortgage on their residence. Affidavit ¶6, Exhibit D.

6. At the time of the Bank's loan to Oakland, Oakland opened a general checking account with the Bank (the "Glen Head Account"). Affidavit, ¶7, Exhibits E and F. The Glen Head account was a general account, and there were no restrictions on Oakland's right to make withdrawals. Affidavit ¶7.

7. Oakland maintained accounts at the St. Clair National Bank of Belleville, Illinois (the "St. Clair Account") and the Trade Bank & Trust Company of New York. Affidavit ¶8; Brede Testimony, at 8-9.

11. Oakland made deposits in the total amount of \$47,738.56 in April of 1971, \$48,105.05 in May of 1971, and \$12,075.21 in June of 1971. Affidavit, Exhibit H.

12. In "June or July", Herman W. Brede, President of Oakland, telephoned Anthony D. Famighetti at the Bank in order to advise that Oakland was in "financial trouble". In that conversation, Mr. Brede stated that he "was going to talk to the other creditors to tell them that [he] was in trouble * * * [and] was still trying to work [his] way out of it." Brede Testimony, at 10-12.

13. The foregoing conversation between Mr. Brede and Mr. Famighetti, then the Bank's President (now Chairman of the Board and Chief Executive Officer), occurred on June 29, 1971. Affidavit ¶14, Exhibit I.

14. As a result of the conversation between Mr. Brede and Mr. Famighetti on June 29, 1971, the Bank, on June 30, 1971, set-off Oakland's funds in the Glen Head Account on June 30, 1971, which totalled \$108,783.91. These funds were applied against Oakland's indebtedness to the Bank in the amount of \$125,000.00. Affidavit, ¶15, Exhibits J and K.

15. On July 15, 1971, an involuntary petition in bankruptcy was filed against Oakland in the United States District Court for the Eastern District of Illinois. Plaintiff's Answers to Defendant's Interrogatory No. 1. Subsequently, Oakland was adjudged bankrupt on August 18, 1971. Complaint, ¶5.

16. Donald Katz, the plaintiff herein, was appointed trustee in bankruptcy for the Oakland estate on or about October 12, 1971. Complaint, ¶5.

17. On October 12, 1971, counsel (now counsel to the trustee) for the receiver (now trustee) of the Oakland estate examined Mr. Brede, Oakland's President, in the bankruptcy court, under oath pursuant to Section 7a(10) of the Bankruptcy Act, 11 U.S.C. §25(10).

For purposes of this motion I have assumed that at the time of the set-off Oakland was insolvent and that the bank had reasonable grounds to believe that Oakland was insolvent. Since the set-off was by definition for the benefit of a creditor, the bank, on account of an antecedent debt, since it occurred within four months of bankruptcy, and since its effect enabled the bank to obtain a greater percentage of its debt than other creditors of the same class, it follows that all the elements of a voidable preference under §96 are present if the set-off itself constituted a "transfer" of Oakland's property.

The general law has been accurately summarized in 4 Collier on Bankruptcy §68.16 as follows:

The general rule may first be stated that where an insolvent depositor makes general deposits within four months of his bankruptcy, which deposits are accepted in good faith and in the regular course of business, the bank has a right to setoff such deposits against an obligation owing to it by the depositor. Obviously, where the bank has no knowledge or imputation of knowledge, or "reasonable cause to believe", that the depositor is insolvent, such routine deposits are clearly available as set-offs. **But even though the depositor was insolvent and knowledge of this fact could be charged against the bank at the time when the deposit was made, the bank is still entitled to apply the deposit on its claim, so long as it was accepted in good faith, in the ordinary course of business.** It is only where affairs have reached such a point that the bank accepts the deposit for the purpose of payment, or of giving itself a subsequent advantage over other creditors through its right of set-off, or for some other special purpose, that the deposit and the subsequent application of it amounts to a recoverable preference. (At pp 917-920.1; *emph. supp.*)

A few pages later, discussing the requirement that the deposits be accepted in good faith and in the ordinary course of business, the author further states:

The usual general deposits made on an open checking account subject to withdrawal at will constitute the type of deposits which will more often be considered above suspicion. But if the deposits are not accepted in the ordinary course of business, or are procured, accepted or "built-up" for the real purpose of permitting the bank to obtain a set-off, the deposits will be considered voidable preferential transfers and the right of set-off is lost. (At pp 923-925).

In **Jensen v. State Bank of Allison**, 518 F2d 1 (CA8 1975), bankruptcy trustee sought to vacate a set-off by the bank. As here, there was no evidence of the bank's complicity in a build-up of the depositor's account, or that the deposits had been accepted in order to permit the bank to obtain a preference. The account was one of long standing. The court noted that "[u]nder the Bankruptcy Act, no voidable preference is ordinarily created when a bank sets off funds in an account of general deposit with it against the debt owed it by the depositor". 518 F2d at 4.

In **Farmers Bank v. Julian**, 383 F2d 314, 325 (CA8 1967), the court stated:

Section 68(a) of the Bankruptcy Act, 11 U.S.C. §108, applies and allows a setoff to [a] Bank unless the account has been accepted or built up for the real purpose of permitting the Bank to obtain a preference by way of setoff of the account. A bank account at the time of filing the petition in bankruptcy is a debt due to the bankrupt from the bank, and in the absence of fraud or collusion between the Bank and the bankrupt, the Bank may set the account off against any indebtedness owed it by the bankrupt. * * * The bank has the right to set off deposits against indebtedness even though the bankrupt is insolvent at the time of setoff and before the petition in bankruptcy is filed.

Further in **Farmers Bank v. Julian**, *supra*, the court stated the issue as follows:

The issue is: Was the account of the bankrupt built up, **with the understanding of the Bank**, for the purpose of allowing the Bank to use it as an offset and thereby obtain a preference? 384 F2d at 324 *emph. supp.*

In the present case Herman Brede, President of Oakland, had personally guaranteed, together with his wife, the corporate obligations to the bank. From the fact that approximately \$107,000 was deposited by Oakland in the general checking account in the bank, one might infer that Brede had intended to make those funds available for a set-off in the event of a bankruptcy. The key to the problem here, however, is that there is nothing presently in the record or which might be available to the plaintiff on a trial to show any complicity by the bank in such an intention.

Insofar as the bank's actions are concerned, up until June 30, 1971, when its right of set-off was exercised, the funds which had been deposited by Oakland in its open checking account were available for withdrawal. There is nothing to show that the bank engaged in any collusion with Brede or Oakland, that it in any way isolated or liened the funds in Oakland's checking account, or treated the transactions in any way different from any other general checking account. Under such circumstances the bank had a right of set-off and its exercise thereof did not constitute a voidable preference.

Pinpointing the issue somewhat more narrowly, the cases seem to say that a bank's set-off of a general checking account will not constitute a voidable preference if the deposits were built-up or accepted in the regular course of business. The question arises: whose business? the bank's? or the depositor's? The trustee argues that this set-off must be voided if the deposits were not made by Oakland in the regular course of its busi-

ness. I disagree, and for purposes of this motion, I have assumed that the deposits were **not** made by Oakland in the ordinary course of its business, but were instead made either to isolate funds from its Illinois creditors, or to place funds within easy reach of the bank's right of a set-off, which, if exercised, would reduce Brede's potential liability on his personal guarantee to the bank.

Such action by the depositor alone is not enough to constitute a voidable preference. The test is not whether the deposits were made in the depositor's regular course of business, but instead, whether they were accepted by the bank in its regular course of business. Viewed in that light, there is nothing in the record by which the trustee could establish on a trial that these deposits were received by the bank in anything other than its ordinary course of business. The funds were kept available in the checking account, ready to be withdrawn any time up until the right of set-off was exercised.

Upon the oral argument plaintiff's attorney conceded that if on the law relief required the bank's involvement in the build-up of the account, and if there was nothing in the papers before the court to create a question of fact as to the bank's participation, collusion or complicity in a plan by Brede to prefer the bank over other creditors, then summary judgment would have to be granted to the defendant. I have reviewed the papers submitted on the motion, including both the affidavit and deposition of Anthony D. Famighetti, president of the bank, and conclude that neither anything in the papers nor in Mr. Famighetti's testimony raises any issue of fact on that key question.

None of the cases cited by plaintiff involves situations where a set-off was invalidated in the absence of evidence indicating that the bank had received the deposits in a manner not constituting the ordinary course of business. Since plaintiff has been able to produce no such evidence here and indeed has conceded

that all the evidence available to him is presently before the court, no purpose would be served by permitting this case to go to trial.

Brede having disappeared, as noted by plaintiff's counsel on the argument, his testimony would not be available on a trial. Accordingly, summary judgment in favor of the defendant dismissing the complaint must be granted.

So Ordered.

Dated: Brooklyn, New York
October 19, 1976

/s/ GEORGE C. PRATT
U. S. District Judge

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JUDGMENT

(Filed October 22, 1976)

A memorandum and order of Honorable George C. Pratt, United States District Judge, having been filed on October 22, 1976, granting defendant's motion for summary judgment and dismissing the complaint, it is

Ordered and Adjudged that the plaintiff take nothing of the defendant and that the defendant's motion for summary judgment is granted and the complaint dismissed.

Dated: Brooklyn, New York
October 22, 1976

/s/ LEWIS ORGEL
Clerk

By: /s/ THOMAS B. COSTELLO
Chief Deputy Clerk

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NOTICE OF APPEAL

(Filed November 19, 1976)

To: First National Bank of Glen Head

And: Weil, Gotshal & Manges

767 Fifth Avenue

New York, NY 10022

and

Goldman, Horowitz & Chernow

P. O. Box 630

Mineola, NY 11501

Attorneys for Defendant-Appellee

Notice is hereby given that Donald Katz, as Trustee in Bankruptcy of Oakland Foundry Company of Belleville, Illinois, Inc. plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the Order of the United States District Court for the Eastern District of New York granting the motion of the defendant for summary judgment entered in this action on the 19th day of October, 1976.

Date: November 12, 1976.

DAVID J. LETVIN and

JOEL A. KUNIN

COHN, CARR, KOREIN, KUNIN and
BRENNAN

412 Missouri Avenue

East St. Louis, Illinois 62201

(618) 274-0434

and

MURRAY S. LUBITZ

KAZLOW & KAZLOW

111 Brook Street

Scarsdale, New York 10583

Attorneys for Plaintiff-Appellant

46-47

**DEPOSITION OF ANTHONY
FAMIGHETTI**

[1*]

United States District Court
Eastern District of New York

Donald Katz, Trustee in Bankruptcy
of Oakland Foundry Company of
Belleville, Illinois, Inc.,

Plaintiff,

against

First National Bank of Glen Head,
Defendant.

Deposition of Defendant, First National Bank of Glen Head,
by Anthony D. Famighetti, taken by the Plaintiff, pursuant
to Notice, held at the offices of Marshall, Bratter, Greene, Al-
lison & Tucker, Esqs., 430 Park Avenue, New York, New
York 10022, on the 23rd day of October, 1974, at 2:05 P.M.,
before a Notary Public of the State of New York.

[2] Appearances:

For the Plaintiff:

Marshall, Bratter, Greene, Allison & Tucker, Esqs.,
430 Park Avenue, New York, New York
10022, By: Arthur J. Ginsburg, Esq., of Coun-
sel

* Numbers appearing in brackets in text indicate page numbers
of original stenographic transcript of testimony.

For the Defendant:

Weil, Gotshal & Manges, Esqs., 767 Fifth Avenue,
New York, New York 10022, By: Michael L.
Cook, Esq., of Counsel, and William M. Gold-
man, Esq., of Counsel

It Is Hereby Stipulated and Agreed by and between the
attorneys for the respective parties hereto that filing, sealing
and certification be and the same are hereby waived.

It Is Further Stipulated and Agreed that all objections, ex-
cept as to the form of the question, shall be reserved to the
time of the trial.

It Is Further Stipulated and Agreed that the within exam-
ination may be subscribed and sworn to before any Notary
Public with the same force and effect as though subscribed
and sworn to before [3] this Court.

ANTHONY D FAMIGHETTI,

a witness herein, being first duly sworn by a Notary Public
of the State of New York, was examined and testified as fol-
lows:

Examination by Mr. Ginsburg

Q. What is your name? A. Anthony D. Famighetti.

Q. Where do you reside? A. 31 Beechwood Drive, Glen
Head, New York.

Q. Mr. Famighetti, are you connected, in any manner, with
the defendant, First National Bank of Glen Head? A. Yes,
I am.

Q. In what capacity? A. I'm president of the bank.

Q. Were you president of the bank in July of 1971? A.
Yes, I was.

Q. How long have you been president of the bank, sir?

A. Better than eight years now.

[4] Q. Are you also a shareholder of the bank? A. Yes, I am.

Q. A substantial shareholder? A. Not substantial.

Q. As president of the bank, what, sir, are your duties? A. Administrator of the bank, and particularly I'm involved with lending operations, and I guess principal responsibility and general welfare and running of the bank.

Q. Do you have, or did you have in or about January of 1969, a special lending department at the defendant bank, or was this directly under your supervision in connection with your duties as president? A. We didn't classify it as a special department, but rather there were certain of the officers who functioned in special or particular lending capacities, if this is what you mean.

Q. Yes.

These lending officers worked under your direction and supervision at that time? A. Yes.

Q. Did the lending officers maintain a credit file with respect to particular outstanding loans with [5] the defendant bank? A. Could you repeat that?

Q. Did the defendant bank maintain files with respect to outstanding loans? A. Yes.

Q. Pursuant to the notice of examination dated August 12, 1974, which was served on your counsel, do you have the documents pertaining to the lending file with respect to the \$125,000 loan made to the bankrupt in this case? A. Yes.

Q. Do you have that with you today? A. Yes.

Q. Could that be produced, sir? A. Yes.

Mr. Ginsburg: I ask counsel if this particular file which was just handed to me was previously turned over to me in connection with the plaintiff's document request?

Mr. Cook: Yes, with two exceptions which we just noticed this morning, and those two are a memorandum dated January 2, 1969, and another memorandum dated October 17, 1969, both of which are now available to you for your [6] examination and/or copies.

Mr. Ginsburg: Well, just referring to the documents which I received annexed to the plaintiff's answer to interrogatories dated May 29th, 1974, I show you the documents that were annexed to it that I received, and I see that this is substantially more, and that I have not seen all of the documents except the two memorandums you referred to. I see ledger cards in here, I see credit reports, all of which I did not receive before.

Mr. Cook: We responded to your request to the extent possible at the time, the two memorandums I mentioned, were the two things we thought fell within your request, but you are also free to examine and/or copy anything else at this time.

Mr. Ginsburg: What you are saying is that the document request as originally served on you, you believed that the documents which were handed to me that day did not encompass all of the documents which I just got, and that notice of deposition did?

Mr. Cook: We felt at the time they were [7] not included within the request, or they were not available to us at the time. I believe, for example, that we discovered the two memorandums today for the first time.

Mr. Ginsburg: But the ledger sheets they were included as part of the document request, and I think the checks were approved as part of the document request, and yet I did not receive these before, is that correct?

Mr. Cook: If that is not attached to the response that you have.

Mr. Ginsburg: I obviously will need some time to sit down and take a look at this, and I obviously will need to carry forth

with the deposition, and I will try to do as much as I can today, but these documents, some at least that I am seeing right now, I have never seen before, for instance, some of the financials. Obviously I have seen some, but I think you know what I am saying.

Mr. Cook: I understand.

Mr. Ginsburg: What I would like to do next with this entire file that you turned over to me today, is get it xeroxed at some point, [8] whether you do it at your office and just send me a copy, if that is amenable to you.

Mr. Cook: That is fine.

Q. Mr. Famighetti, can you tell me when was the first time that you met Mr. Herman Brede? A. I can't give you a specific date.

Q. Approximately which year, can you give me that? A. Well, you see, he was with us prior to this association.

Q. Prior to the instant loan in suit? A. Oh, yes. He had another business of his own.

Q. Herman W. Brede Company? A. That's right, and I guess he was with us six or seven years prior to this loan.

Q. In other words, the Herman W. Brede Company has an outstanding business relationship with the defendant bank since in or about 1962 or 1961? A. Yes; going back—I would say that is right, about that time.

Q. Was that the only outstanding account with your bank the Herman W. Brede Company incorporated? And I am referring to any other company which Mr. Brede might have had some affiliation with; did that other [9] company have an account with your bank prior to 1969? A. I don't recall another company, but he did have a personal account with us.

Q. What type of an account was that? A. It was just a simple household or joint account with his wife, as I recall.

Q. Was that a checking account or a savings account, sir?
A. A checking account. I do not know whether a savings account might have existed.

Q. Do you know when that checking account with Mr. Brede was first opened? A. No.

Q. You do not? A. I do not know. Are you speaking of his personal account now?

Q. That's right. A. No, I don't know.

Q. Was that what you were referring to, sir, the personal account? A. Yes; I do not know when it was opened.

Q. Do you know if Mr. Brede and/or his wife Betty Brede had a personal account with the defendant bank on or before January of 1969? [10] A. Yes, they must have had one.

Q. Let me ask you this, sir: Can you determine by checking your banking records when Mr. Brede's individual account with the defendant bank was opened? A. Oh, yes.

Q. Could you tell me when the bankrupt account was first opened with the defendant bank, Oakland Foundry Company of Belleville, Illinois, Incorporated, being referred to here as being the bankrupt account? A. That was open at the time that we submitted some of the first disbursements of the loan.

Q. Do you know when that was? A. I can just refer to that date, January of 1969.

Q. And it is your best recollection that the bankrupt at the time had a checking account or opened a checking account with the defendant bank at the time that the loan was made? A. Yes.

Q. In or about January of 1969, when the loan was made to the bankrupt, and it opened its checking account with the defendant bank, did the bank have any outstanding loan agreement with Herman W. Brede and/or his wife Betty Brede, individual loans? [11] A. I do not know specifically at that time.

Q. Could that be checked, sir? A. Sure.
Shall we make a record of these?

Q. Well, you can get it from the transcript, that is one way. Obviously before the next session I would like the answers provided, if we could. I will give your counsel his EBT transcript as soon as I get it, that is the best way to check it. A. Okay.

Q. Can you tell me, sir, if you have any recollection of whether these two individuals had individual loans with the bank on or before January of 1969? A. We had extended credit to Mr. Brede; I don't recall any individual borrowings because some other officers might have handled that. As far as H. W. Brede, Incorporated, he would have to come to us, but we had extended credit to him in the past.

Q. When you say to him, you mean to his company? A. To his company.

Q. And he was president of that company? A. Yes.

Q. Was his wife involved in connection with the [12] running of the business of Herman W. Brede Company, Incorporated?
A. I don't know.

Q. Well, in connection with your dealings with Herman W. Brede Company, Incorporated, were your negotiations and/or discussions primarily with Mr. Brede? A. Yes.

Q. Were they entirely with Mr. Brede? A. Yes.

Q. As of January, 1969, do you know the extent, if any, of any outstanding loan obligations which Herman W. Brede Company, Incorporated had with the defendant bank? A. No, I do not recall that, I do not know that.

Q. Could you check your records to determine if there were any outstanding loans at that time? A. Yes.

Q. And also check your records to determine if the individuals, Herman Brede and/or Betty Brede, had any outstanding loan obligations with the bank as of that time? A. Yes.

Q. This is all prior to January of 1969. A. Right.

[13] Q. Prior to January of 1969, did your bank have a relationship with Electronic Cabinets, Incorporated? A. I guess I would have to check the records.

Q. Well, that is another thing.

Do you know if your bank had a savings account or a checking account for Electronic Cabinets, Incorporated? A. No, I don't remember.

Q. Do you know whether or not Electronic Cabinets, Incorporated had any outstanding loan obligations? A. I don't recall.

Q. At the time that the Herman W. Brede Company, Incorporated initiated its first lending relationship or borrower relationship with your bank, do you know if a checking account or a savings account was opened simultaneously with the defendant bank? A. Well, the corporation?

Q. Yes. A. Yes, simultaneous with the disbursement of the loan, a checking account was established for Oakland Foundry.

Q. Are you speaking of Herman W. Brede Company, Incorporated? A. No, that had already existed.

[14] Q. In other words, there was a savings account or checking account with Herman W. Brede, Incorporated before he got the first loan from the defendant? A. Yes.

Q. But that wasn't the case with respect to the loan made to Oakland Foundry; with respect to that loan there was a simultaneous opening of a checking account on the date that the loan was initiated? A. Yes.

Q. Was that normal banking practice, to open up a checking account at the same time that the loan was made to a particular entity? A. It's the norm, it does happen.

Q. Are there cases where it does not happen? A. Corporate accounts can open without the request for credit at the same time, yes.

Q. Are there instances when a corporate client will ask for a loan without having any savings or checking accounts with the particular defendant bank? A. Yes, there could be instances where that would occur.

Q. I am speaking specifically, do you have corporate borrowers that do not have checking accounts with your bank, corporate borrowers? [15] A. I doubt it.

Q. Well, would you check to see if that is the case? A. You want us to check our records to see if we happen to have a corporation that had a loan with us that did not have an account?

Q. That is correct.

I am just trying to find out your business practices, and I am trying to explore the reason why, if any, it is your business practice to have a checking account opened for a particular company at the time that it obtains a loan from your bank.

Mr. Cook: I believe he has testified this is standard practice.

Your question is, as I understand it, were there instances when such an account was not set up for a corporate borrower.

Mr. Ginsburg: That is correct.

Mr. Cook: I believe he testified he didn't know.

Mr. Ginsburg: But my question goes further and asks him to supply me with a yes or no answer.

I will restrict that to commercial [16] loans, we can restrict the question to commercial loans only.

Q. Are there any cases where a commercial borrower will not be required to open up a savings account or a checking account with your bank? A. That is not likely to happen.

Q. Can you tell me, sir, in January of 1969, if the bank held a mortgage on Herman Brede's home? A. No, we did not.

Q. Did you subsequently obtain mortgage for Mr. Brede's home? A. Yes; we took a second loan on his property, yes.

Q. Do you know the circumstances which precipitated the obtaining of that second mortgage? A. Yes. It is quite a lengthy story, I guess I will have to tell you——

Mr. Cook: He didn't ask you that, he asked you if you knew.

The Witness: Yes.

Q. Please state the circumstances, if you know. A. Well, the circumstances were that the original credit was advanced or extended on the basis of a cleanup within a one year period.

[17] Q. The original credit extended to Oakland Foundry? A. Yes, it was to be cleaned up within one year.

Q. You mean the original loan was to be cleaned up within one year? A. Yes.

Q. Or on or about January 16th, 1970? A. Right.

And when this did not occur, we then took action to rewrite the loan, putting ourselves in a more secure position, and asked for the second mortgage on his property to continue the credit; that is basically what happened.

Q. When did this discussion take place with respect to the second mortgage on his property? A. I couldn't give you the date, but it would have preceded the maturity of that one year period.

Q. Where did these discussions take place? A. It could have taken place in my office.

Q. Between you and Mr. Brede? A. Yes.

Q. Was anyone else present at this discussion? A. There might have been an occasion, I don't [18] recall, when the mortgage question came up at that time. There was one incident where I had asked, of course, that he be accompanied by his accountant so we could go into the financial maturities.

Q. Who was his accountant at the time? A. I can't give you the name of the firm.

Q. Was it Brach Lane? A. No, it was a Mr. Hirschberg, I think.

Q. Mr. Hirschberg was with Brach Lane? A. Oh, I see, you mean the firm; Mr. Hirschberg was the individual.

Q. Let me ask you this: The first time that Mr. Brede came to your bank in connection with the obtaining of a loan on behalf of the bankrupt, could you fix a date for that, sir? A. I couldn't fix a date, it would have been prior to the extension of the credit, of course, but I can't give you a date.

Q. Who had the discussions with Mr. Brede with respect to obtaining the loan for the bankrupt? A. I did.

Q. You being the only person with the defendant who did? A. Yes.

[19] Q. Was Mr. Brede the only person who negotiated the loan on behalf of the bankrupt? A. Yes.

Q. Were these discussions, did they take place within one to two months prior to the execution of the instant loan? A. It could have been as long as that.

Q. Can you remember the substance of your first conversation with Mr. Brede with respect to his request for the loan on behalf of the bankrupt? A. Well, actually, it came out of a courtesy call in connection with his already established account, and a luncheon that followed; and during the course of discussion Oakland Foundry came into the picture.

Q. What already established account? A. H. W. Brede Company, Incorporated.

Q. And the courtesy call came from Mr. Brede to you? A. No, me to him.

Q. So in a luncheon conversation in and about the last month of 1968, or the beginning of 1969, you had lunch with him and he suggested that he would like a loan from your bank for Oak-

land Foundry? A. That was the substance, that came into the [20] conversation, of course.

Q. What, if anything, did you say? A. I don't recall what my conversation may have been, but we would look into whatever we could do that would be helpful to him, essentially.

Q. What, in fact, did you do with respect to looking into whether or not you might be helpful; did you run a credit check? What investigation did you make of the corporate bankruptcy? A. We would ask, first of all, that financial statements be delivered to us, and at that interview we would set up as much historical back ground as we possibly could or needed for the credit requested.

Q. Specifically, do you know what background you obtained, if any, with respect to the bankruptcy? A. I think that original memorandum would probably give you the benefit of that information.

Q. That is the memorandum dated January 2, 1969? A. Yes, that is the one.

Mr. Ginsburg: May we have this marked as Plaintiff's Exhibit Number 1, please.

(Whereupon, a memorandum dated January 2, 1969, was marked as Plaintiff's Exhibit 1 for identification, as of this date.)

[21] Mr. Ginsburg: You realize I didn't get copies of this either, this is the first time I am seeing it, and that is why there might be a delay in things I think, because I haven't seen all the documents, and agreements, and that is all I am saying. It is going to take me time to get through this one or two inches of statements, obviously as to the memorandum to which he previously referred, I haven't seen, because they are the inhouse memorandums.

Q. Now the memorandum dated January 2, 1969, which the reporter has identified as Plaintiff's Exhibit 1, is that the inter-

office credit memo of the defendant bank? A. It is not an inter-office memo.

Q. Well, how would you describe it? A. It is the origination of credit memo.

Q. Who makes that report? A. Anyone of the originating officers of the credit request.

Q. Who was the originating officer with respect to this credit request? A. I was.

Q. Did you make the investigation which is set [22] forth in Plaintiff's Exhibit Number 1? A. Yes.

Q. You did, yourself? A. Yes.

Q. The memorandum that is dated January 2 of 1969, indicates that Mr. Brede approached the bank for a line of credit; does that refer to the line of credit for Oakland Foundry, the bankrupt? A. Yes.

Q. Was this memo dated before or about the date that the first discussion with Mr. Brede was held regarding the loan, which he requested the bank to make to Oakland? A. Yes.

Q. Did Mr. Brede explain to you the nature of the business of the bankrupt? A. Yes.

Q. Can you tell me what he said? A. Offhand, this was an independently operated organization located in Belleville, Illinois, and it manufactured small space heaters; if I recall, that is just the nature of the item that we talked about.

Q. Did he say that the space heaters were part of the kitchen components, or did he say that he made [23] or that Oakland made kitchen cabinets? A. I don't recall.

Q. Did you have any discussion with respect to the products which the bankrupt manufacturer made which were tied to the construction industry? A. Well, he supplied it for the construction industry, yes.

Q. Did he advise you of that? A. Yes.

Q. Did you have any conversations with respect to the business of the construction industry during 1969 and the economy as related to the construction industry? A. Yes, we did.

Q. When were those discussions? A. They may have been subsequent to the origination, I think.

Q. I understand that.

Not at the time that the loan was first made to Oakland?

A. No.

Q. Do you remember the first time that the discussions were held with respect to the construction industry? [24] A. Yes; we got into conversation on that where he had been broadening his operation and trying to make sales contacts, and developing an outlet for his product in multi-housing, dormitories, municipal type buildings of that nature.

Q. Well, I am speaking specifically, did Mr. Brede ever inform you that the construction industry was economically hit during 1969 or 1970, and that his products were tied to the success of the construction industry; were there any discussions in words or substance to that effect? A. Well, to the effect that there had been—I am going to use the word a downturn in the construction industry, and a slow down, and that products weren't as he had projected.

Q. When did he first project his products in the construction industry to which you referred? A. Subsequent to the original loan.

Q. There came a time when he came to you subsequent to January of 1969 and projected what he felt would be the progress or the economical climate as to the construction industry in the time to come? A. It wasn't quite that way, but rather it wasn't meeting what he had anticipated, put it that way. [25] The turn-down or the downturn had been such to have been slower than had originally been anticipated.

Q. Can you fix a time when he first said that to you, or to anyone with the bank? A. No, but it would probably have been on a three month cycle, because our notes as they were paid were cycled for maturity in three months, and at that time we would sit down and discuss the situation again.

Q. Well, the note was issued on or about January 16th, 1969, and the first three months renewable period would have occurred in April of 1969? A. Yes.

Q. At that time, did Mr. Brede indicate to you that there was a downturn in the construction industry? A. He could have.

Q. Would there be any memos in the bank files which would reflect whether or not such a conversation took place? A. I would have to search the file to see if there is.

Q. What was handed to me today by your counsel, that is the entire file wherein such a memo would be kept if, in fact, it was made? A. No; there was no other file, that is it.

[26] Q. What you handed me today, sir, does that purport to encompass all of the documents pertaining to the loan between the defendant bank and the bankrupt? A. All that I am aware of, yes.

Q. Does this file purport to encompass all of the ledger entries including deposits and withdrawals for Oakland Foundry Company of Belleville, Illinois, Incorporated? A. Yes.

Mr. Goldman: In fact, if there are any other files or any other statements, we can supply those to you.

Mr. Ginsburg: I asked for them and I would like to have an opportunity to see those.

Q. Do I have everything with respect to the ledger entries regarding the checking account for the bankrupt in this file, sir? A. I assume that you do, sir.

Mr. Goldman: I don't think, and you can check through it, I thought you told me you did not have the 1969 checking account statement?

If it is not there, we have it, and we will supply them to you.

Q. At the time that the original loan was [27] executed on or about January 16th of 1969, was there a discussion with respect to any collateral being given in connection with that loan?

A. This is in 1969?

Q. That is correct. A. The origination of the loan?

Q. Yes. A. Yes.

Q. What discussion was that? A. The discussion was to the extent that we would look to the information, the claim as represented by H. W. Brede stock and the Cabinet stock.

Q. Was this specifically pledged with you? A. Yes, it was.

Q. It was physically held? A. Yes.

Q. Was any collateral given by H. W. Brede Company, Incorporated in connection with its corporate loans from the defendant bank; or were those all unsecured? A. I would have to check the bank; I believe they are all unsecured, but I would have to check the records.

Q. Do you remember, sir, if a discussion was [28] held between you and Mr. Brede with respect to obtaining possible collateral for the loan when the prior practice with Herman W. Brede Company, Incorporated was, to the best of your recollection, not posted collateral? A. Well, as I have just said, that we were considering this loan on the basis of the collateral that we just mentioned.

Q. I understand that. But what I am trying to solicit, if this was in a discussion, why it would be necessary for the bankrupt to post collateral as opposed to Mr. Brede's company, which had, in the past, not posted collateral? A. His demand had not been anywhere in this area of collateral.

Q. What you are saying then is that Herman W. Brede Company, Incorporated, had borrowed money in a lesser sum than Oakland? A. Yes.

Q. Can you state what those sums were? A. I would have to check the records, but they were substantially less.

Q. Would you advise us what the outstanding loan relationship was with Herman W. Brede Company and the defendant bank as of January 16th, 1969? [29] A. Yes.

Q. At or on January 16th, 1969, Oakland executed a promissory note to the defendant's order in what amount, sir? A. \$125,000.

Q. Is a copy or the original of that loan in this loan file? A. Of the original note? No, the note is not there, that would have been returned to them, but the information leading to or the granting of it, is what you just turned over.

Q. That would be the January 2, 1969 statement identified as Plaintiff's Exhibit 1 for identification? A. Yes.

Q. Did Mr. Brede ask for \$125,000 for the bankrupt or for more money? A. He had asked for \$250,000.

Q. How did it come to pass that he was given fifty percent of what he asked for? A. We have—our loan committee could not see advancing this total amount to Oakland Foundry.

Q. Who were the members of the loan committee as of January 16, 1969? A. I would have been on the committee, and three [30] other members of the board of directors.

Q. Do you know their names? A. Mr. Joseph L. Martin, Alfred Shahniz, and I forget again who the third party was, but it was imprinted on the approval sheet, on the very front.

Just the three of us.

Q. Did you consult with these gentlemen prior to the execution of the loan? A. Oh, yes, they would have acted on the approval.

Q. Was this a meeting of the board of directors which you previously referred to as being held in connection with the making of the instant loan? A. No.

Q. This was not? A. No.

Q. Was this an informal discussion between you and those gentlemen and other gentlemen with respect to their giving their approval? A. No, not an informal meeting, it was presented as you see it there.

Q. Was it presented in a formal meeting? A. Oh, yes, a formal meeting of that group of people to act on that loan.

Q. Who, if anyone, first raised the discussion [31] about that \$125,000 loan in or about January of 1969? A. Well, are you speaking of the \$125,000?

Q. Right. A. This is the reduction from \$250,000 to \$125,000.

Q. Well, initially, how was it raised at the meeting as to what amount the borrower was requesting, and who raised that subject; was that you, sir? A. It could very well have been me, sir, yes.

Q. Do you recall what, if anything, you said with respect to Oakland's request? A. Yes; I was, in my judgment, reacting to the fact that we were granting the loan on the strength of Herman W. Brede and our already established financial capacity of the H. W. Brede Company, Incorporated account; I could see that.

Q. Could you tell me the scenario that was discussed at that meeting? Did you come and say, "I would like to propose that Herman W. Brede Company, Incorporated, be given a loan?" or "He asked me to get a loan of \$250,000, I put it to you gentlemen." Is that what you said? A. They would have the benefit of reading that material as you have it here, prior to our sitting down [32] and discussing it, as well as the financial statements that had been submitted at that time.

Q. Which financial statements were those? A. We would have had the benefit of the most recent statements; I can't give you the date, but I would have a copy of the Oakland Foundry Company statement, and we would have had the benefit of a file already established on H. W. Brede Company, Incorporated.

Q. Here is your loan file; can you tell me on the basis of looking at it which statement was presented to you in connection with the bank extending the \$125,000 loan (handing)? A. Essentially, we would have worked off basically, as referred on this particular loan, these two financial statements (handing).

Mr. Ginsburg: Can we have these two marked as Plaintiff's Exhibit 2 and Exhibit 3 for identification. The first document is dated December 16th, 1968, with a financial statement. And as Plaintiff's Exhibit 3, that would be a balance sheet purportedly of the bankrupt as of December 31st, 1968.

(Whereupon, a statement dated December 16th, [33] 1968 with a financial statement, and a balance sheet purportedly of the bankrupt as of December 31st, 1968, were marked as Plaintiff's Exhibits 2 and 3, respectively, for identification as of this date.)

Q. I show you what has been marked for purposes of identification as Plaintiff's Exhibits 2 and 3, sir, and I ask you if you can please identify them (handing)? A. I don't know if we had this one in the house or not.

Q. Referring to Plaintiff's Exhibit 3? A. Yes.

Q. You are not certain if you had Exhibit Number 3? A. I don't know whose possession it was in, in 1969.

Q. But two you did, and three you did not? A. Three I don't believe we had.

Q. Did you request Mr. Brede to provide you with a financial statement of Oakland prior to the execution of the loan in January of '69? A. Oh, yes.

Q. When was that first requested of Mr. Brede? A. That would have been in preliminary conversations, we would have asked for both the [34] financial statements.

Q. Did you have a discussion with Mr. Brede after you looked at the income statement for the eleven months ending November 30th, 1968? A. We would have, because I believe that would have been the statement we had on hand.

Q. Did you have any discussion with respect to the deficit in those eleven months? A. Yes, we would have.

Q. Do you remember what you said and what he said? A. No.

Q. Do you have anything that would refresh your recollection in connection with any discussion which you had with Mr. Brede, or might have had with Mr. Brede, with respect to the approximate \$200,000 deficit which the bankrupt had as of the eleven month period ended November 30th, 1968? A. I can't specifically say what we said, but we certainly looked at the fact that they had a corporation that was functioning in a deficit position.

Q. Did he tell you how long it had been functioning in a deficit position? A. No, I don't recall that he told me how long.

[35] Q. Did he tell you that the company had turned a profit in the last few years prior to 1969? A. I think, yes—he had—well, I would have to check my memos on that.

Q. Which memo would that be? A. I think that would be in my original memo, which would be this one (indicating).

Q. Would you check that memo and determine if such a representation was made by Mr. Brede? A. I don't see where I refer to the profitability, other than this was an excellent product.

Q. Did you express any concern to Mr. Brede with respect to the fact that his company had turned a loss for the eleven months prior to the execution of the loan? A. We would have, yes.

Q. In what form did you express this concern, if any? A. One would have been with the reduction of the amount of credit that he requested.

Q. Is that the reason why it was reduced fifty percent? A. One of the reasons, and also to bring it in line with the individuals—his own personal financial [36] strength, and the H. W. Brede Company, Incorporated.

Q. Now you are speaking in terms of his guaranteeing the loan? A. Oh, yes.

Q. Did he submit a personal statement of his financial net worth? A. Oh, yes, at that time.

Q. Do you have a copy of that with you, sir? A. Yes; which would have been the one available at that time.

Q. What you are now holding in your right hand, which we will have identified as Plaintiff's Exhibit 4, was the personal financial statement of Mr. Herman W. Brede, submitted at the time of the January, '69 loan? A. Yes. This predated the loan, this is the one that would have been in our possession. (Indicating)

Mr. Ginsburg: Mark it as Plaintiff's Exhibit 4, please.

(Whereupon, a financial statement of Herman W. Brede of October 31st, 1968, was marked as Plaintiff's Exhibit 4 for identification, as of this date.)

Q. Did you ask Mr. Brede to provide you with any other financial statement with respect to either [37] Electronic Cabinets, Incorporated, his personal net worth, or his wife's net worth, or Oakland Foundry's financial condition, prior to the time of the execution of the loan, other than Plaintiff's Ex-

hibits 2, 3, and 4, which we have previously identified? A. I think I would have asked for the H. W. Brede one as well.

Q. You would have? A. Yes.

Q. That is the H. W. Brede Company, Incorporated? A. That is correct.

Q. Do you see that in the loan file? A. Yes, here it is here, October 31st, 1968. (Handing)

Q. Well, that is a balance sheet, did you ask for an income statement? A. It appears I would have asked for one. It appears that I would have asked for a P and L, but it is not in the file. You have to understand that Mr. Brede was an Electronics representative, and this was not what you would call an ordinary business transaction where you would have sales and costs of sales and it was a pledge representation, and usually the one figure can spell to us their plans and financial position on [38] accounts due him, commissions receivable; these were essentially the income that would be coming to him as the notes matured.

Q. You are saying that as of October 31st, 1968, the fact that Herman W. Brede Company, Incorporated, would have \$126,802 in commissions is something which you took cognizance of? A. Yes, right.

Q. Was this a factor which went into the decision to make the loan to the bankrupt in January of '69? A. Yes, it was.

Q. Were there any other factors upon which you relied with respect to your bank making the loan to Oakland Foundry? A. As I have said before, we merely made a loan on the strength of H. W. Brede as an individual, and the H. W. Brede Company, Incorporated, and extended the credit on that basis, leaving Oakland Foundry completely out of the picture as far as the financial strength and capacity to repay this loan.

Q. What was the total collateral, then, for the execution of the first loan? A. The stock, 100 percent of the stock of H. W. Brede Company, and 100 percent of the stock of [39] Electronics Cabinets.

Q. That is the parent company to Oakland? A. Well, this was apparently a holding company, however he structured it. And the personal guarantees of both he and his wife.

Q. Did you have a financial statement of her net worth? A. It was combined into one.

Q. With him? A. Yes.

Q. Did you know the nature of the business of Herman W. Brede Company, Incorporated? A. Yes.

Q. What was that? A. Manufacturer representative of electronics and defense industries.

Q. Do you know if Electronic Cabinets, Incorporated engaged in any sales or manufacturing on its behalf, or was merely a holding company? A. I have no way of justifying how they entered into one another; as you have stated, that was the parent company to Oakland.

Q. Did you indicate to the members of the [40] committee which approved the loan, that you felt, based upon the financials which you received, that it would be a good loan, something in words and substance to that effect? A. Yes, that is true, and my credit memo will probably express more how it was expressed to the committee.

Q. The memo of January 2, 1969? A. Yes.

Q. Do we have that? A. Yes, it's marked as an exhibit now.

Q. Can you tell me the discussion, if any, that the other members of the committee engaged in at or about that time with respect to the demand of the loan? A. Only to the extent of having had the benefit of reviewing this memo in detail themselves, was my opinion expressed.

Q. Plaintiff's Exhibit 1? A. Yes.

And then we would have discussed the figures as they might appear on the financial statement.

Q. Go ahead, if I have interrupted you. A. No.

[41] Q. How was it determined that the loan request should be reduced in half? A. As I had previously stated, in keeping it within the financial strength of H. W. Brede Company, Incorporated, and the personal strength of his personal net worth, I should say financial strength is what I mean.

Q. When was the first time that a discussion was held between yourself and Mr. Brede with respect to his individual guarantee of Oakland's proposed loan? A. It could have occurred prior to my presentation of this to the board, because I would have had his agreement to this before I submitted it to the board.

Q. When was the discussion first raised, was it raised at that loan discussion? A. No, that was the initial discussion of credit.

Q. Does that relate to something other than executing a loan, the discussion of credit? A. Oh, sure. We have interviews with the applicant, and it probably took place—the date of that statement January 2 was probably the date that we actually had the discussion, the board acted on a later date for the approval of it, and this was all expressed—

[42] Q. Prior to January 16th of 1969? A. Oh, yes.

Q. You stated that the discussion with respect to credit or a line of credit related to something other than the execution of a loan by Oakland? You indicated the discussion, the initial discussion at lunch with respect to a line of credit related to something other than the execution of the loan; it was not the same concept? A. The original discussion?

Q. That's right, at lunch. A. At lunch that was a courtesy call made by us, or by myself in connection with our already established relationship, and the need for capital assistance came out of that as a part of the discussion at lunch.

Q. To Oakland? A. To Oakland.

Q. You are not certain if at that luncheon meeting regarding the proposed loan to Oakland, it was discussed whether or not Mr. Brede and his wife would have to personally have to guarantee such an obligation? A. I don't recall if we covered it at that time.

Q. Do you remember the first time that that subject was raised between you and Mr. Brede? [43] A. No, I don't, but it is a normal operating procedure for us to get the person to guarantee his loan on corporate borrowings.

Q. Normal in cases of loans in the sum of \$125,000? A. Almost absolute where small individually held corporations are involved.

Q. You knew that this was a privately held company? A. It was not a public company that I was aware of, no, privately held.

Q. Did Mr. Brede actually physically hand over to you all of his shares of stock in Herman W. Brede, Incorporated, and Electronic Cabinets, Incorporated at the time of the execution of the loan? A. Yes.

Q. He and his wife executed the loan agreement? A. Yes.

Q. Do you have copies of the original loans with you today, sir? A. The notes themselves?

Q. Yes. A. No, they would have been returned as they are paid or renewed.

[44] Q. What about the original guarantees? A. The guarantees are a separate form.

Q. I understand that.

Do you have copies of those with you, the original of those?
A. Here is the guarantee of Electronic Cabinets guaranteeing the loan of Oakland Foundry; this is where they both, Mr. Brede—I don't seem to find the front sheet of this, but Mr. Brede and Mrs. Brede guaranteed the Oakland Foundry portion.

This is where Mr. Brede and Mrs. Brede guaranteed Electronic Cabinets, Incorporated; so they guaranteed it.

Q. Did you mention a subordination agreement? A. Yes.

Q. Does it relate to the instant loan? A. There might have been something—let's see, there might have been a corporate borrowing consent to our debt as to H. W. Brede and the Electronic Cabinets Incorporated and Oakland Foundry, so that our debt could have precedence over any intercorporate borrowings.

Mr. Ginsburg: I guess we ought to identify all the guarantees that you have given me.

[45] The Witness: Yes.

(Whereupon, a statement for Electronic Cabinets, Incorporated dated January 16th, 1969 was marked as Plaintiff's Exhibit 5 for identification, as of this date.)

(An individual guarantee of Electronic Cabinets Incorporated dated January 16th, 1969, was marked as Plaintiff's Exhibit 6 for identification, as of this date.)

(The personal guarantee of Oakland Foundry dated January 16th, 1969, was marked as Plaintiff's Exhibit 7 for identification, as of this date.)

Q. Plaintiff's Exhibits 5, 6, and 7 were all guarantees that were executed by Herman W. Brede and his wife, both individually, and in their capacity as officers of Electronic Cabinet Company, Incorporated, and Herman W. Brede Company, Incorporated, with respect to guaranteeing the instant loan to the bankrupt? A. Yes.

Q. Was it presented to the committee at the bank which approved the loan on or before January 16th, 1969, that such would be the guarantors for the loan to Oakland, if it were made? [46] A. Yes, because they would have been submitted to them at the time.

Q. Were the personal guarantees a condition for making the loan to Oakland? A. Yes.

Q. Without them, without these guarantees, the loan would not have been executed? A. That's right.

Q. And that was conveyed to Mr. Brede? A. Yes.

Q. Were there any discussions with Mr. Brede with respect to his providing financial statements, either profit and loss statements or balance sheets, of any companies and/or his individual net worth, subsequent to the statement which he gave you prior to the execution of the January 16th, 1969 loan? A. Yes.

Q. What were the discussions held in that regard? A. That we would expect quarterly statements from Mr. Brede.

Q. Unaudited or audited? A. I don't believe I specified at that time, I just wanted to get a temporary idea.

Q. Which quarterly financial statements did the [47] bank specify it wanted to receive from Mr. Brede, which companies and individuals? A. Particularly Oakland Foundry.

Q. The bankrupt. What about Electronic Cabinets, Incorporated; how about their financial statements, if any? A. I think we would have looked at them, but I don't remember if he included that in his statement at the time.

Q. Was this in addition to Herman W. Brede Company and its financials, providing financial statements? A. Yes.

Q. As well as Mr. Brede's and his wife's financial statements? A. Not on a quarterly basis.

Q. On a yearly basis? A. Yes.

Q. Were these statements, which we have been referring to, so provided at or about the time that the bank required that they be provided? A. No, they were not. Only as we have here in the file.

Q. Would you please state for the record which [48] statements the bank did receive, and on which dates they were, in fact, received, sir, if you know; aside from Plaintiff's Exhibits 2 and 3, which are financial statements you did receive? And when did you receive them? A. The dates of receipt I don't have, but we did receive the March 31st, 1969 ones.

Q. Which ones? A. This is the Oakland Foundry, a subsidiary; these are Oakland Foundry. (Indicating)

Q. Are all the statements in your hand ones that were received by your bank? A. Yes.

Q. And you cannot ascertain when they were received? A. I don't have the date of receipt, no.

Q. But were they received at or about the time that they are purportedly dated on each financial? A. I would say after, since the date would have to pass.

Q. I understand that, but would they have been submitted to you within two months subsequent to the date of the financials; if you know? A. I don't know, but I would assume that we would [49] have them within two months.

Mr. Cook: You don't know?

The Witness: I don't know.

Q. Was it your practice to ask Mr. Brede and/or his companies that were submitting these statements, to provide them to you on a regular basis? A. Yes, it was.

Mr. Ginsburg: Could we identify this, Mr. Reporter, which are the dates which the witness has in his hands.

(Whereupon, a balance sheet as of April 31st, 1969 was marked as Plaintiff's Exhibit 8 for identification, as of this date.

And a balance sheet dated June 30th, 1969 was marked as Plaintiff's Exhibit 9 for identification, as of this date.

And a balance sheet for September 30th, 1969 was marked as Plaintiff's Exhibit 10 for identification, as of this date.

A financial statement for Oakland Foundry Company, dated October 31st, 1969, was marked as plaintiff's Exhibit 11, for identification, as of this date.)

Q. Did you focus on that income statement when [50] you received it, Mr. Tamighetti, indicating that there was a \$319,000 loss for Oakland for 1969? A. I would have.

Q. Did you focus on that as well as the 1968 accumulated loss of approximately \$200,000? A. That is 1968, the prior year?

Q. That is correct. A. Yes.

Q. So that in 1968 and 1969 the bankrupt had apparently lost half a million dollars on the basis of its own financial statements that it had presented to your bank; is that correct? A. You are stating the financials, and I am not sure what you are talking about.

Q. See 1968 here (handing)? A. They already had an accumulated deficit at the time of \$223,000, and we moved up to \$309,000; is that what you are saying?

Q. 319,000. A. So the accumulation would have been the difference between these two (indicating).

Q. So it lost an additional how much? A. Just short of \$100,000.

Q. Just short of \$100,000 during calendar year [51] 1969, since the loan was made to Oakland? A. Right.

Q. Did Mr. Brede continue to submit financial statements to you subsequent to the 1969 financial statement? A. Here again, we don't have a date of receipt here.

Q. I am speaking about receiving any financial statements subsequent to the ones which we have just identified? A. I don't know; we would have already been in 1970 at that time.

Q. Specifically, financial statements for 1970 of the bankrupt? A. That is correct, we only have '68 and '69, which we have identified.

Q. Do you have any recollection of receiving the bankrupt financial statements for calendar year 1970 apart from what you have in your file today? A. I don't recall, I haven't received them.

Q. Wasn't it your testimony, sir, that you required Mr. Brede and Betty Brede to submit quarterly financial statements with respect to the corporate guarantors? [52] A. Yes.

Q. Now you are saying that you have no recollection of receipt of these financial statements? A. Right.

Q. Isn't it true that even with respect to the ones that you received during 1969, that they were not received on a quarterly basis? A. Well, they were received on a quarterly basis, but we do credit them on a quarterly basis.

Q. For each of the quarters? A. Yes.

Q. But you have no recollection of receiving them during 1970? A. Yes.

Q. Do you remember having any telephone conversations or discussions with Mr. Brede about the failure to receive those statements? A. Yes, I do, only to the extent that each time we had the opportunity to speak, I would prompt him to get the financial statements in; I don't recall the dates.

Q. What is your physical proximity to Mr. Brede with respect to 689 Glen Cove, to Glen Head and the bank? A. About a mile difference at the most, yes.

[53] Q. He lived in upper Brookville; is that correct? A. Yes.

Q. And he had an Oyster Bay post office; does that sound right? A. That could be right, the coastal lines are so irregular.

Q. Can you tell me if Mr. Brede, to your knowledge, worked at Herman W. Brede at 689 Glen Cove Road on a regular basis? A. That was his established office.

Q. For Herman W. Brede Company? A. Yes.

Q. To the best of your knowledge, he worked there on a day to day basis; if you know? A. That could possibly be so in one instance and not in another, but that he was a manufacturer representative, and he traveled extensively; there have been many occasions when I was not able to get him at his office.

Q. But the seat of his operations was a mile from your bank? A. Yes.

Q. Did you ever phone him there in connection with the instant loan? [54] A. I would have called there on every instant loan, yes.

Q. Well, specifically during 1970, the first time that the quarterly statement for Oakland and/or other corporate guarantors was due, or should have been received by the bank, did you phone over there or drive over to his office? A. I did not make a personal call, but we would have followed up for financial statements.

Q. Please state in words or substance what you mean by following up on the financial statements; did you write a letter? A. I didn't write any letter that I can recall, but I would have called his office.

Q. Had you written a letter it would have been in the credit file which was produced today? A. Yes.

Q. If you made any interoffice memo or memos on the file in your handwriting, that would also be included in the loan file which you produced today? A. It would have been if I recorded it.

Q. Was it your practice to make any handwritten notations with respect to the instant loan pertaining to conversations? [55]

A. All my recordings of this loan would have been dictated items.

Q. Dictated items which would have been incorporated in an extension to your credit memo? A. Yes.

Q. Would those dictated recorded items all be reflected in the loan file which was produced today by counsel? A. Yes.

Q. No other place? A. No; it should have been in this file.

Q. Can you tell me what, if anything, did Mr. Brede state to you the first time that you raised the fact that the corporate financial statements were overdue, if he said anything? A. It's hard to recall, but along the line "I'll get back to you as soon as I can, or as soon as I am able to."

Q. Did he? A. During 1970 I had a problem.

Q. During 1970 you had a problem? A. Yes.

Q. Was that the first problem that you had in connection with the subject loan; that is, the failure [56] on the part of Mr. Brede to provide financial statements as required? A. I don't quite understand what you mean by "problem."

Q. Well, you used the word problem, and I merely paraphrased what you said; that it was the first problem. Is that what you said?

Mr. Ginsburg: Will the reporter just read back what the witness' last sentence was?

(Last question was read.)

A. This is 1970, now we are in 1970.

Q. I asked you when you had the first problem and you said the first problem was when he failed to provide the financial statements, I assume it was 1970? A. Or maybe I didn't say it was—I didn't say it was the first problem.

Q. Was that the first problem? A. Well, I just am categorizing it as a problem. Servicing a loan sometimes can be considered a problem in itself, just simply taking care of the loan and following up on the loan.

Q. Have you finished your answer? A. Essentially, yes.

[57] Q. In connection with servicing this particular loan, was this the first time in 1970, after you had not received the financial statements, that you had some concern with respect to the ability of the borrower to repay the loan? A. No, it wasn't, because—

Mr. Cook: That is the answer to the question, "No, it wasn't."

Q. What, if anything, caused you not to believe that there was no problem with respect to the ability of the borrowers to repay the loan? A. Because we were relying on the H. W. Brede and the personal guarantees we had behind the loan.

Q. Was there a discussion inhouse at the bank, between you and other persons with respect to the instant loan when the financial statements were not received during 1970? A. Yes.

Q. What, if anything, was said by you and what, if anything, was said by them? A. It was moved to strengthen our position.

Q. When was this, sir? A. It would have been—I have to go by the memo to see when the date was.

[58] Q. You have got the file in front of you. A. On January 16th of 1970 at the renewal of the note at that time.

Q. At the renewal of the note? A. At that time.

Q. Wasn't the note renewed on a quarterly basis? A. Yes, and this is at the renewal of the note at that time.

Q. The renewal of the note at the end of the first anniversary?

A. Yes.

Q. Which would have been a fourth renewal of the loan?

A. Yes.

Q. Were there discussions prior to the fourth renewal of the loan, with respect to furnishing financial statements by the borrower? A. I would normally have asked them to submit statements, yes.

Q. We are talking about, now, discussions which were held between the people at the bank and yourself with respect to the bank strengthening its position on the anniversary date, the first year anniversary date of the loan. Were such discussions held prior to the [59] first anniversary date of the loan? A. I don't recall; I'm sure we were thinking in those terms.

Q. Were you thinking in those terms? A. Oh, yes.

Q. What were you thinking? A. To collateralize ourselves as best we could.

Q. You mean in December, the way you had already collateralized yourself at the time of the inception of the loan? A. Yes.

Q. What, if anything, were you specifically thinking about with respect to further strengthening your position through the addition of further collateral? A. Obtaining a second mortgage on his home.

Q. Anything else? A. And with all guarantees remaining as they originally were.

Q. All guarantees remained each time that the loan was renewed at the expiration of the three month time period; is that correct? A. Yes.

Q. Each loan was a three month timer? A. Yes.

[60] Q. At the expiration of a three month period the note was cancelled and reissued? A. Just renewed.

Q. At the time that it was renewed, the original guarantees remained in effect, or were these new guarantees each time it was renewed? A. No.

Q. The life of the loan? A. Yes.

Q. At any time prior to the first anniversary date of January 16th, 1970, were there discussions with respect to the bank strengthening the collateral with respect to the subject loan? A. I don't think there were any discussions, but I as servicing the loan was thinking in those terms.

Q. Were you the primary or the sole person involved with respect to servicing the loan, this loan? A. The principal person, yes.

Q. I'm not speaking about any secretary that would write a credit. A. No.

Q. In connection with servicing the loan, your discussions or communications with the bankrupt were [61] held primarily or solely with Mr. Herman W. Brede? A. Yes; I don't think—I'm sure I didn't have any other officer at any one time that he discussed the loan with.

Q. What about some officer of the bankrupt? I am referring to Mr. Kessler or persons who were affiliated with the bankrupt. A. No, they were not involved.

Q. Prior to 1970, did you ever state to Mr. Brede that in order to strengthen the bank's position, it would be necessary for him to permit the bank to take a second mortgage on his house? A. I don't think I did prior to 1970.

Q. When did you say this, if at all? A. It would have been at the anniversary, the one year anniversary of the loan would be the time that I would move to take this action.

Q. What, if anything, prompted you to take this action? A. Two things, the financial statements of course, and secondly, that it is a normal operating procedure on the part of our bank

that lines of credit are cleared from the books at the anniversary date of the loan, within one year.

[62] Q. And if not? A. If not, we would then review his file to secure ourselves in order for this credit to continue.

Q. Despite the fact that you were already secured a determination was made by the bank to require additional collateral? A. Yes.

Q. Obviously one of the key determinations behind this decision was the fact that the company had an accumulated deficit of over \$300,000 and had lost \$100,000 in the prior calendar year of 1969? A. Right.

Mr. Cook: I believe you testified to that, I don't believe he testified to that, and I object to that.

Q. That is the case though, sir, that the bank was concerned with the fact that Oakland had an accumulated deficit of over \$300,000, and the financials showed that they had lost \$100,000 during calendar year 1969; and that it was aware of that and that it was concerned about that; is that correct? A. It would have been taken into consideration, but again, we acted originally on the strength of the individuals and H. W. Brede Company, Incorporated. Now [63] on short term credit which goes into the long term category, we would then structure the loan for collateral values for long term purposes.

Q. What you are saying is because the loan was not paid off on a one year period, it became a long term structure as opposed to a short term transaction? A. Yes.

Q. I think you also testified, though, that the bank was concerned about the downturn with respect to the profitability of the Oakland Foundry of Belleville, Illinois, Incorporated, the bankrupt? A. Well, we were looking at that; we knew where the money went and we would not divorce ourselves completely.

Q. Did you have any conversations with Mr. Brede during 1970 on or about the anniversary date with respect to the profitability of the bankrupt? A. Yes, it would have been on the renewal, nearest that date.

Q. What, if anything, did you say, and what, if anything, did he say? A. That we would look for the cleanup of this debt.

Q. What, if anything, did he say? [64] A. I don't recall, other than what might have been represented in a memo.

Q. Could you refresh your recollection by looking at the memo and try and reflect and remember what, if anything, he said? A. Well, I don't know whether you want me to read it, but essentially the memo——

Q. I would like you to refresh your recollection on the basis of the memo, and if your recollection is refreshed you can testify without looking at the memo.

Mr. Cook: Has the memo been marked?

Mr. Ginsburg: That is Plaintiff's Exhibit 1 for identification.

The Witness: No, this is January 16th, 1970.

Mr. Ginsburg: Then let's mark the memo.

(Whereupon, a credit memo dated January 16th, 1970, was marked as Plaintiff's Exhibit 12 for identification, as of this date.)

A. One thing that came to light was that—it is not specifically cited here, but he had in the meantime obtained an SBA loan in the interim, and he gave us pretty much of a background as to how the funds were used.

[65] Q. When you say he, do you mean Oakland Foundry or himself, individually? A. No, Oakland Foundry; how it was used for the purposes of Oakland Foundry.

Q. Did he state the amount of the SBA loan? A. \$250,000, apparently.

Q. Which refers back to your memo of October 17th? A. Yes; \$250,000 as a SBA loan.

Q. Did he show you the loan papers in connection with that SBA loan? A. No, he did not.

Q. Did he tell you whether or not he was an individual guarantor? A. I don't recall.

Q. Do you remember asking him? A. No, I don't.

Q. Was the discussion with respect to Oakland obtaining an SBA loan that you had with Mr. Brede held prior or subsequent to the one year anniversary date of the loan? A. That would have been prior to.

Q. So you were aware that Oakland had a quarter of a million dollar SBA loan prior to the time that you asked for further collateral of Mr. Brede? [66] A. Yes.

Q. Was this fact of the SBA loan in the sum of a quarter of a million dollars brought to the members of your bank, the loan committee, to keep them advised of the status of the corporate borrower? A. Yes, it would have been in this memo of October 17, number one.

Q. Is it fair to say that at the anniversary of January 16th, 1970, that the bank was aware that the borrower or borrowee had not only lost \$100,000 the prior calendar year, but also had been extended further credit in sums of a quarter of a million dollars by the United States Government Small Business Administration? A. I guess I would have to say that.

Q. That is the case, though, you knew that these were two circumstances that directly pertained to the corporate borrower? A. Hold on; in addition there is an October 17th statement saying they are applying; I don't know whether the funds are dispersed at this point. They are applying for a \$250,000 loan through the St. Clair National Bank; but here on January 16th I say, "Loan mentioned in the memo of October has been

granted." [67] So it was as of January that we were aware of that \$250,000.

Q. The bank was aware on the anniversary date that the loan was granted and that a loss for the company had been incurred for the prior calendar year? A. Yes.

Q. Did members of the committee at the bank and/or yourself, ever ask Mr. Brede for the underlying loan documents between Oakland and SBA? A. No.

Q. Did you ever request that it was a personal obligation on his part or his wife with respect to the pay down of that loan? A. No.

Q. Did it ever occur to you to ask him if he was personally obligated to repay the loan in the event that the corporate borrower was unable to do so? A. It might have occurred to me.

Q. Did you state to him your concern about the fact? A. I don't recall.

Q. Do you remember the terms of the SBA loan with respect to a time loan? A. Only to the extent that he was applying and [68] it was repayable over the years and then later it developed it was a eight and a half percent loan primarily in eight years, and monthly payments of \$3,500.

Q. Did you ever have a conversation with Mr. Brede at the first time you heard about his application, and/or after the grant of the loan, with respect to the ability of Oakland to repay the SBA with respect to principal and interest, as well as your bank? A. Mr. Brede was always very optimistic in his ability to get this company going and pay his debt.

Q. To you as well as to SBA? A. I hardly believe that St. Clair National Bank would have gone through with it if they didn't also believe that he had the capacity there, and that he had the plant in hand.

Q. Did Mr. Brede ever advise you prior to the anniversary date in 1970, that the commissions due him as reflected on H. W. Brede and Company financial statements previously submitted to you, had not, in fact, been received during 1969? A. He never advised me that they had not received them.

Q. Did you ever follow up on whether or not the [69] commissions payable to H. W. Brede and Company, were ever received by H. W. Brede and Company? It was a matter that you looked at in connection with demanding the loan, was it not? A. Yes.

Q. And that the \$820,000 was a matter which was at least a hopeful sign for Brede and Company, and it was a significant factor at that time in connection with making the loan to Oakland? A. You used a figure I think of \$820,000; you can take a look at it, it's only \$112,082.

Mr. Cook: At what point in time are you referring to?

Mr. Ginsburg: It was a significant factor at the time that the original loan was executed, at least that is what the testimony was. The testimony of Mr. Famighetti was that he looked at the commissions payable to Brede and saw that \$112,000 were due, now I am asking Mr. Famighetti if, in fact, he had a discussion with Mr. Brede prior to the anniversary date of January 16th, 1970, with respect to whether or not the \$112,000 in commissions payable which is in the column of accounts receivable in the manufacturing business, [70] were, in fact, paid to Brede and Company.

The Witness: I can't remember discussing that with him.

Q. At the time that the loan was made to Oakland on January 16th, 1969, and a checking account was opened on behalf of Oakland, which your testimony is it was the first bank account which Oakland had with the defendant; is that not correct? A. Yes.

Q. Is that checking account number 01-72585-8? A. That is correct, yes.

Q. Was there a separate contract or an agreement which was executed simultaneously with the opening of that checking account between Oakland and the bank? A. No.

Q. There was no customer contract? A. Just a corporate resolution and signature card.

Q. Was there any discussion at or about the time of that bank account being opened with respect to Oakland maintaining an compensating balance? A. We would have looked for it, expected it, yes.

Mr. Cook: That is not the question; the question was: Was there any discussion with [71] respect to a compensation?

Q. It calls for a yes or no; that is what counsel is saying. Yes or no.

Mr. Cook: If you know.

A. We already had the main account, we also had the other corporate account.

Q. You had Mr. Brede's joint checking account with his wife? A. With his wife.

Q. Which was on deposit with your bank since when; if you know? A. No, I don't remember.

Q. An approximation? We have to have a date and we have to know what the balance of that bank account was. A. This is personal accounts and——

Q. That's right. Because you are relying on it, and it is relevant to that extent. A. Is that both accounts?

Q. That's right, as well as Herman W. Brede Company, Incorporated; because you are holding all the stock.

Mr. Cook: Off the record.

(Discussion off the record.)

[72] Q. Do you have any independent recollection of what the balances in those accounts might have been prior to January 16th, 1969, in any rough estimate? A. I don't know.

Q. Whether we are talking about four figures, or five figures or six figures, you wouldn't know? A. No.

Q. On or about January 16th, 1969, did you have a discussion with the members of the banking committee which approved the instant loan, with respect to Oakland maintaining a compensating balance in its checking account? A. I think we would have looked for it, I don't remember that we had a conversation specifically.

Q. When you are speaking about maintaining a compensating balance, you are speaking in terms of a certain percentage of the loan which is being made to the borrower, that would be required by the bank to be held on deposit; is that the same sense that you are speaking of it in terms of it? A. That is how it is understood, yes.

Q. When you indicated to me, sir, that the bank would be looking for it, what specific percentages, if any, does the bank look for under circumstances such as [73] this instant loan? A. We would look more principally for the account, and hopefully there would be satisfactory balances as they relate to the credit extended.

Q. As opposed to a rule of thumb percentages? A. That's right.

Q. During 1969, the first year that the loan was made, was the bank satisfied with respect to the amount of the balance kept on hand by the bankrupt with the defendant bank? A. Yes.

Q. Do you remember what that balance was; would you refresh your recollection? A. It was a fluctuating one, this was a

rather active account and it hit five figures high down to—well, I can't give the lows.

Q. Can you take a look at the document before you? A. Yes, but I just couldn't give you the answer. '69, is that what you are referring to specifically?

Q. That is what we are talking about. 1969. A. 1969 was—during 1968 there were lows of—How do you want me to answer this?

Q. Do you have an average? A. I don't know, but I couldn't give you an average.

[74] Q. Could you tell me in each month of 1969, what the high was and what was the low? A. In each month of 1969?

Mr. Cook: When you give a figure would you identify the source of your information?

The Witness: I am going to have to identify this?

Q. Are those all of the ledger sheets for the bankrupt account from 1969 through 1971? A. I would believe so, yes.

Mr. Ginsburg: Let's identify them so we can talk in terms of specifics then. I think we ought to mark them. Then you can refer to them in your testimony as a specific exhibit and then identify the month.

(Whereupon, 34 documents of bank balances of Oakland Foundry Company were marked as Plaintiff's Exhibit 13 for identification, as of this date.)

Q. Before we go into that, sir, can I ask you, sir, if you are related to Mr. Brede by blood or marriage? A. No.

Q. Were you friendly with Mr. Brede other than [75] this business context? A. That is the only relationship I had with him.

Q. Let's go to these documents then. A. Shall I give the date?

Q. Yes, and the average. A. January of 1969 the high balance was the original advance of \$125,000; the low balance was \$59,740.

Q. Did he state the purpose for the loan to you? A. Did he state the purpose for the loan?

Q. Capital, equipment, expenses, whatever? A. It was represented in the memo that I have here, yes, which indicates that it is for general application of working capital; working capital fund.

February of '69 the high of \$59,740.11 to \$35,165 as the low.

March of '69, \$35,165 to a low of \$14,689.

April of '69, \$14,689 to \$13,552.

Q. These are all withdrawals not deposits during that time? A. No, there were deposits as well coming in.

Q. All right. A. May of '69, \$13,552——

[76] Q. That is the high? A. No, let me correct that; the high was \$19,009, and the low was \$13,552; it is reversed.

June of '69, a high of \$19,009, and the low of \$11,638.

July of '69, \$24,929, and the low of \$9,212.

August was a high of \$24,929, and a low of \$9,697.

September of '69—there is a second sheet here that may be correct—that is all right as it was. September of '69 is a high of \$32,496, and a low of \$4,688.

October of '69, a high of \$30,060, and a low of \$13,522. I'm sorry, the high was \$31,064.

November of '69, a high of \$45,525, and a low of \$3,790.

December of 70——

Mr. Cook: Excuse me, did you give us December of '69?

Mr. Ginsburg: I didn't hear it.

The Witness: Well, I took that second one; we will have to correct that November one.

November should have read a high of \$20,596 and a low of \$3,790.

[77] Now December should read a high of \$45,525, and a low of \$3,790.

January of 1970, a high of \$42,715, and a low of \$39,000—it's a bad figure here, but it looks like \$39,006, it might be eight.

In February of 1970, a low of \$30,433, and a high of \$64,963.

March of 1970, a high of \$56,938 and a low of \$28,642.

April of 1970, a high of \$34,211, and a low of \$28,911.

May of 1970, a high of \$29,290, and a low of \$23,003.

June of 1970, a high of \$23,003, and a low of \$11,088.

July of '70, a high of \$11,088, and a low of \$5,824.

August of '70, a high of \$7,824, and a low of \$4,596.

September of '70, a high of \$4,596, and a low of \$4,387.

October of '70, a high of \$4,387, and a low of \$1,347.

November of '70, a high of \$1,347, and [78] a low of \$1,047.

December, a high and low of the same balance \$1,047.

In January of '71, a high of \$4,047, and a low of \$1,047.

In February of '71, \$1,390 as a high and low balance for that month.

In March of '71, \$1,390—wait, hold on, that is the low; and the high is \$4,313.

In April of '71, a low of—I will make this out as best I can, this is \$1,657, and the high of \$48,603.

In May of '71, a high of \$96,708, and a low of \$48,603.

June, there is a low balance of zero that we effected our offset with. We had a high balance which was \$108,783.91 and a low, of course, would have been the bank——

Q. Going back, there was no written understanding between or among the bank and any of the guarantors including the bankrupt, with respect to having a compensating balance at the defendant bank during 1969? A. During 1969?

Q. Yes, sir. If you can recollect without [79] refreshing your recollection, if you know? A. Yes; we did ask for a compensating balance in the sense of the principal account being placed with us.

Q. What do you mean by principal account? A. Oakland Foundry's principal account, the Oakland Foundry and H. W. Brede, the administrative officers were in Glen Head.

Q. Which administrative officers were in Glen Head? A. Oakland Foundry as well as H. W. Brede Company, Incorporated.

Q. You mean the administrative officers for Oakland were not in Belleville, Illinois? A. All of the administration was taken care of here in Glen Head.

Q. I think I interpreted your answer. You were saying that you wanted—— A. I just wanted to explain to you prior to that our attitude was towards compensating balances that it would relate to the credit we were extending, and that we would look for reasonable compensating balances as relating to the credit to be extended. This is pretty generally the attitude we take in connection [80] with all our loans; to that extent they were aware and we had asked the balances to be maintained.

Q. When was the first time that you asked that such a balance be maintained? A. I don't recall that it was part of the original, which you had already asked me, but at a later date

With the benefit of time that the account was with us, we did make the request, I'm pretty sure those balances didn't maintain themselves.

Q. You mentioned that an accountant was visiting with you; was the accountant visiting with you on or before the first year of the anniversary date? A. Yes, preparatory for the anniversary date.

Q. At that point in time was there a request for Oakland to maintain a certain balance with the defendant bank? A. No, not a certain balance; we were now aware that SBA was coming into the picture and St. Clair Bank, I think I tried to explain before, that St. Clair National Bank might ask for balances relating to its total extension of credit, and therefore we wanted to be sure that we weren't left out in the cold, since we were extending substantial dollars too.

Q. When was this conversation that you are just [81] referring to, when did it take place; the discussion or conversation between you and the account or between yourself and the other people at your bank? A. No; with Mr. Brede and his accountant in anticipation of the anniversary date of the loan.

Mr. Cook: I believe you also testified that he is not a bank accountant, but he was Mr. Brede's accountant.

Q. Was it Mr. Brede's accountant. A. Mr. Brede's accountant.

Q. So prior to January 16th, 1970, you and Mr. Brede and his accountant sat down and discussed the possibility that St. Clair might require a certain balance in its bank, and therefore you would also—— A. You are saying that, what I had said was that I was cognizant, I was aware, that this might occur, and I would look for our balances to maintain themselves.

Q. Any particular balances or just balances in general? A. No particular balances. In general we don't follow a hard and fast rule, we relate it to the credit that is extended.

Q. The credit extended at that point was still \$125,000? [82] A. Yes; so we had been enjoying pretty good business, I didn't want to see it depleted to zero.

Q. Isn't it so, that at the end of November or at least at some point in November of 1969, you had a low balance of \$3,790.99? A. Yes.

Q. Did this cause you some concern? A. Not at the specific time, I don't think I even glanced at that.

Q. At the time that you were discussing the fact that St. Clair might require a balance on hand with Oakland, during your discussions with Mr. Brede and his accountant on or about January 16th, 1970, did you bring up the fact that Oakland's account was down to below \$4,000 at the end of November of 1969? A. No; I think the accountant met with us prior to that date.

Q. The accountant met with you prior to November of '69? A. Yes; it would have been right after the third quarter statement, because his anniversary would not have had the new statement in time for the anniversary date, so we would have met before, and I believe that I would have met before November, since [83] the September 30th statement should have been in our hands prior to that.

Q. What, if anything, did you say to his accountant or to Mr. Brede with respect to St. Clair requiring a balance in connection with that SBA loan? A. I didn't say anything as it relates to them, I just said as it related to us, that we would look, and that we would have balances in his account, you called them compensating balances.

Q. What do you call them, sir? A. Compensating balances.

Q. That is what I call them. A. But I am not tying it for a specific amount, if that is what you are asking.

Q. I am trying to get to the substance of your conversation as opposed to rule of thumb. I just wanted to know what you said to Mr. Brede and his accountant, and what they said to you in connection with maintaining a compensating balance, or a balance of Oakland at the defendant bank during 1969.

A. I know that I had mentioned that we would look for their balances to be maintained with us at reasonable levels, and I don't think there was any remark back other than the gentlemen understanding it. [84] I don't think there was any discussion, they just acknowledged that this was in order.

Q. When was the first time that it was brought to your attention that Oakland Foundry had a checking account at the St. Clair National Bank in Belleville, Illinois? A. I knew before we established our account.

Q. It was brought to your attention? A. Oh, sure, that account existed prior to our extension of credit and prior to establishing an account with us.

Q. Did Mr. Brede make you aware of the fact of what balances were maintained at that St. Clair Bank? A. No, he didn't.

Q. Did you ask him? A. I don't recall that I really asked him, no.

Q. Did you ask his accountant—is that Mr. Hirschberg? A. At the origination of the loan Mr. Hirschberg was not involved at all.

Q. Mr. Hirschberg was not involved? A. At the origination of the loan.

Q. Who was, if anyone? [85] A. Just Mr. Brede.

Q. Did you ever ask for a statement of the funds that were maintained at the St. Clair Bank at any point during your long

relationship with Mr. Brede or his companies? A. I had made a call to St. Clair Bank as a normal credit check, and I, at that point, without looking back at the notes would not recall if it would cover the point of the balances, but I don't think we just simply relied on how the account is maintained.

Q. When you made this call, was it prior to the execution of the January 16th, 1969 loan? A. Yes.

Q. There was no specific request at that time for the amount of balance which Oakland maintained with that bank? A. I don't recall, unless I made a note of it. Can I refer to my notes?

Q. Yes. A. No, my notes don't show whether I inquired of them about the balances maintained, but rather my conversation was more directed to the loan extended to Oakland Foundry.

Q. At a later point in your dealings with Mr. Brede [86] and his companies, did you ever contact the St. Clair Bank to inquire as to the nature or the amount of the balance maintained by Oakland with it? A. No.

Q. Did you ever make such a request of Mr. Brede subsequent to the end of 1969? A. I don't recall if I did—no.

Q. Were you aware of the type of account which Mr. Brede's company, Oakland Foundry, had at the St. Clair National Bank? A. Other than the notation that they were happy with the credit that they had extended to Mr. Brede and would have extended additional credit—I am pursuing the investigation of the credit, and they were very happy with their credit.

Q. Did you ever inquire of Mr. Brede the types of obligations which were paid by that Illinois bank? A. No, but I do know that we covered the bank, and that he would have his copy of the substantial account there at the St. Clair Bank.

Q. He told you that? A. No.

Q. He told you that? A. He indicated he would have to keep an account [87] there.

Q. He never discussed what that account would be used to pay, whether it was a payroll account, or an accounts payable account? A. No.

Q. Did he ever advise you or did you ever ask him, what the purpose of the checking account at your bank would be for; that is, what obligations, if any, it would pay? A. No.

Q. To your knowledge, was the defendant bank the drawee in connection with any checks payable for interest payments in connection with the instant loan? A. I don't know.

Q. Do you know if the St. Clair National Bank was? A. No, I don't know.

Q. Were any interest payments paid by the borrower, Oakland, to the defendant during 1969? A. Yes.

Q. Were they timely? A. That is part of the record, that they were paid, I think they were reasonably on time.

Q. When you say that, you are reading from—— [88] A. This is our liability ledger to see when the loan went on and when they paid, et cetera.

Mr. Ginsburg: I guess we will mark that as Plaintiff's Exhibit 14, please.

(Whereupon, a liability ledger was marked as Plaintiff's Exhibit 14, for identification, as of this date.) A. (Continuing) I note that was due on April 16th, the interest was paid on April 18th; they were reasonably on time, yes.

Q. They were reasonably on time with respect to the payments of interest during the entire calendar year of 1969? A. Yes.

Q. There were three payments during that year and one in the first month of January, 1970? A. Yes.

Q. The loan was renewed when, for the first time? A. Going from the original?

Q. Correct. A. It was renewed—it was due on April 16th, and then came in on April 18th. That was the first time.

Q. And the next time? A. Due July 16th, renewed July 17th.

[89] Then due October 18th, renewed October 21st, '69.

Due January 16th, renewed January 20th, 1970.

Q. The next time? A. Due May 18th, and renewed June 1, 1970.

It was due June 18th, and we converted then to a collateral type loan; apparently interest was paid that was due at that time on July 6, and the time we must have taken our second mortgage and moved it to a collateral type demand loan.

Q. So it was then changed on July 6th, 1970 from a time loan to a demand loan and the second mortgage against the house was then taken? A. Right; it was tied in at that time.

Q. Each of the times that you indicated in your testimony just given, was the interest payment paid on or about the time that it was required to be paid? A. It was.

Q. Was any principal paid down on the loan? A. No principal from the inception.

Q. At the time that the original loan was executed back on January of 1969, was it agreed between the bank and Mr. Brede that the loan would be paid down in its entirety on or before January 16th, 1970? [90] A. Yes, it was agreed in essence of an understanding, yes.

Q. A verbal understanding? A. Yes.

Q. When that first anniversary date came with respect to paying down the loan, did you have a discussion with Mr. Brede regarding the ability of Oakland to pay down the loan entirely? A. Yes; I should have made a memo at that time, I would have to go back to it.

Q. Is that memo before you today? A. I don't know that I have it.

Q. That would be the January 16th memo that we referred to earlier? A. Yes, January 16th, 1970, that is Plaintiff's Exhibit 12.

Q. Can you tell me if you can independently recollect what you said and what he said with respect to the pay down of the principal on that loan at that time? A. I cannot tell you exactly what his words were, other than that he was in no position to make any payment against our loan.

Q. No, his position, meaning that Oakland did [91] not have the funds to pay it; is that what you said in words or substance? A. I would assume so.

Q. I don't want your assumption, neither does your counsel; we are interested in if you know, and in what you said in words or substance with respect to the inability of the borrower to pay down the loan. A. Well, I can only say that he was unable to make a reduction of the principal at that time.

Q. What, if anything, did you say? A. Well, I would have said that we would have looked at this time for a cleanup, and we were actually aware of a cleanup of the entire debt at that time, which he could not meet.

Q. What, if anything, did you do because he was unable to meet that entire cleanup? A. We agreed that he would submit to the loan committee for a renewal of that debt in three month periods and to wait for the receipt of three month statements within that period.

Q. Did you receive those three month statements within that period? A. Yes.

Q. Which ones were those—is that 1969? [92] A. The year ending 1969, sure.

Q. What, if anything, did you do upon the receipt of the year end '69 statements with respect to your review of the status of that loan? A. We then, at that time, came to the conclusion

that we would have to take a stronger secured position in connection with this borrowing.

Q. Was that particularized with respect to qualifying how you were going to strengthen your position, and at what point in time such increased strength would be obtained? A. Yes, it was at the renewal of that note that that was alarmed that we would get the benefit.

Q. Was it the renewal of April of '70 or as of July of '70, or as of January of '70? A. I cannot recall when we received the '69 statement. I had agreed that we would wait to get a statement, so I cannot give you the exact date.

Q. From whom did you obtain the '69 statement from, his accountant directly or from him individually? A. I believe it was from him individually.

Q. Did it come in an envelope in the mail or did he come into the bank personally? A. He came to the bank.

[93] Q. Was this pursuant to a telephone conversation between you and him that he should come to the bank and see that you get the statement? A. I don't think that I called him, but at the last conversation I had had with him, it was that he was to give that statement to us at the earliest possible date. In fact, I attached urgency to it.

Q. To a piece of paper? A. To the receipt of the financial statements.

Q. Was this via a written communication or oral communication? A. Oral communication.

Q. An oral communication which you had with Mr. Brede sometime prior to the receipt of the financial statements? A. Yes.

Q. Was this prior or subsequent to the first year anniversary date of the obligation? A. No; I believe it would have been following or—it's following the first year.

Q. Upon receipt of the year end financial statements, did you have a conversation with him with respect to any amount of particular balance that he would have to keep in his corporate account at the [94] defendant bank? A. No.

Q. Did you have such a conversation with him or did anyone else at the defendant have such a conversation prior to the change in the loan from a time loan to a demand loan? A. Mr. Brede?

Q. Yes. A. He had no conversation with anybody else.

Q. You had no conversation with him? A. He had no conversation with anybody else besides myself.

Q. I am asking whether or not anyone from your bank had a conversation with him prior to the turnover from the time loan to a demand loan, with respect to a compensating balance? A. I am not aware that he did.

Mr. Ginsburg: I have no further questions at this time.

.....
Subscribed and sworn to before me this ... day of,
1974.
.....

[95]

EXHIBITS

Plaintiff's

For Id.

| | | |
|---------|---|----|
| 1 | Memorandum dated January 2, 1969 | 20 |
| 2 and 3 | A statement dated December 16, 1968 with a financial statement, and a balance sheet purportedly of the bankrupt as of December 31, 1968 | 33 |
| 4 | Financial statement of Herman W. Brede of October 31, 1968 | 36 |

| | | |
|----|--|----|
| 5 | Statement for Electronic Cabinets, Inc., dated January 16, 1969 | 45 |
| 6 | An individual guarantee of Electronic Cabinets, Inc., dated January 16, 1969 | 45 |
| 7 | Personal guarantee of Oakland Foundry dated January 16, 1969 | 45 |
| 8 | Balance sheet as of April 31, 1969 | 49 |
| 9 | Balance sheet, dated June 30, 1969 | 49 |
| 10 | Balance sheet for September 30, 1969 | 49 |
| 11 | Financial statement for Oakland Foundry Company, dated October 31, 1969 | 49 |
| 12 | Credit memo dated January 16, 1970 | 64 |
| 13 | 34 documents of bank balances of Oakland Foundry Company | 74 |
| 14 | A liability ledger | 88 |

[96]

CERTIFICATE

State of New York }
County of New York } ss.

I, George Brown, a shorthand reporter and Notary Public of the State of New York, do hereby certify that on the date and at the time and place hereinbefore set forth, the witness, Anthony D. Famighetti was by me first duly sworn before the commencement of testimony; that I stenographically recorded the testimony of said witness; that the foregoing pages 1 through 95 are a true and accurate transcription of my stenographic notes.

I further certify that I am not related to or employed by any of the parties or their counsel, nor am I in any way interested, directly or indirectly, in the outcome of this litigation.

In Witness Whereof, I have hereunto set my hand this 20th day of November, 1974.

/s/ GEORGE BROWN

[97] Continued Deposition of Anthony D. Famighetti, a witness on behalf of the defendant, taken by plaintiff, pursuant to adjournment, held at the offices of Messrs. Marshall, Bratter, Greene, Allison & Tucker, 430 Park Avenue, New York, New York, 10012, on January 28, 1975, at 10:35 A. M., before Darlene Castellana.

[98] Appearances:

Messrs. Marshall, Bratter, Greene, Allison & Tucker
Attorneys for Plaintiff
430 Park Avenue
New York, New York 10022

By: Arthur J. Ginsburg, Esq.,
Of Counsel

Messrs. Weil, Gotshal & Manges
Attorneys for Defendant
767 Fifth Avenue
New York, New York 10022

By: Michael L. Cooke, Esq.
and
William M. Goldman, Esq.,
Of Counsel

Also Present:

Robert Stein, an officer of Franklin National Bank of Glen Head.

[99]

ANTHONY D. FAMIGHETTI,

a witness on behalf of the defendant, having been previously sworn by a Notary Public of the State of New York, was examined and continued to testify as follows:

Examination

By Mr. Ginsburg:

Q. Mr. Famighetti, you are the same Famighetti who testified in this proceeding on October 23, 1974? A. Yes, I am.

Q. ~~Do~~ you know if the second mortgage on the Brede residence in Glen Cove was paid off at the end of 1970 and extinguished? A. Are you speaking of the mortgage that we held on the premises?

Q. Yes, sir, the mortgage that you held on the premises. A. When he made the final payment on the loan to us——

Q. You mean in July of '71? A. '71, right.

Mr. Cooke: The question is, do you know if the mortgage was paid off at the end of 1970.

The Witness: No, I don't know if it [100] was paid off. I assume it was still open because we had the mortgage continuing on the property until the loan was paid off.

Q. I see. So when the loan was paid off in or about July of 1971, the second mortgage was removed from the property? A. Yes.

Q. What about the first mortgage? A. First mortgage, I don't know when that was paid off. I have no knowledge—it was held by, as I recall, an insurance company, but I can't tell you which one.

Q. Did anyone other than the Bredes obligate themselves with respect to the second mortgage on the property in Glen Cove? A. You keep repeating Glen Cove——

Q. Upper Brookville. A. Yes, that's right.

No, no one else that I am aware of—in connection with our loan, no else was obligated.

Q. I see.

Do you know what financial statements, if any, you received from Mr. Brede relating to any of his companies at the end of or toward the end of 1970? [101] That would include financial statements relating to Electronic Cabinets, Inc., H. W. Brede Co., Inc., Oakland Foundry Co., Inc., and Mr. and or Mrs. Brede's individual financial statements of net worth. A. I feel certain we would have had the year end '70 Oakland Foundry. And personal statements, we were likely to update on a yearly basis, and at the end of 1970 or shortly thereafter, might well have asked for one.

Q. Do you have any independent recollection of so asking?

A. No.

Q. Is there any way you can determine if, in fact, such financial statements were received by the bank, any records?

A. Yes, we would have a financial statement on file if it were received.

Q. Will the records reflect when that financial statement was received? A. Not the date of receipt, no.

Q. I see. There is no stamp mark affixed to it when it comes in through the mail? A. No, it would be—the statement itself would carry a date but not the actual receipt by us [102] of the statement.

Q. I ask you if you have an independent recollection of when, if at all, such statements relating to calendar year 1970 were received by the bank. I am not speaking of which particular month but do you remember when, if at all, they were received?

A. Well, the 1970's we did receive, the Oakland Foundry, as I have replied.

I do not recall that we would have gotten the year end '70 of the personals, and I do not recall that we received any of the others which you mentioned, Electronic Cabinets, without searching the file would I know if we received it or not.

Q. Do you remember having a conversation with anyone at the bank upon receipt of the 1970 financial statements of Oakland Foundry relating thereto? A. Yes.

Q. Yes? A. Yes, 1970—yes, it was after the year end and Mr. Brede would have been in at that time and we would have discussed the fact that his clean-up had not taken place and I would imagine at that time I received the financial statement for the year end, Oakland Foundry.

[103] Q. Well, at what point in time would Mr. Brede have been in to discuss the clean-up of the loan? A. Usually at the maturity of the obligation.

If you recall, our notes matured on three-month intervals and it would have been about that that he would have called.

Q. Would that have been in or about January 16, 1971? A. It could have been that date if that was maturity of that note.

Q. That was the second anniversary date, was it not? A. Well, it was the first anniversary date from the conception of the loan. Is that what you mean?

Q. No. 1971 is, I believe, the second anniversary date, isn't it? A. Oh, you are talking about 1971?

Q. Well, when did you receive the 1970 financials? That's what I am trying to determine. Did you receive them in 1970? A. I don't recall the '70 statement now. I was trying to tie it in to the anniversary date of the—tying it in with the anniversary date of the original extension of credit, and this is the way I was following it.

[104] Q. Right. Well, do you have with you a copy of the 1970 financial statements of Oakland Foundry—well, let me—rather than spending time on that, let me show you what purports to be a balance sheet and an income statement for Oakland Foundry as at December 31, 1970, and I ask you, sir, if you can please identify it. A. Yes, this would be a—December 31, 1970. It is unaudited.

Mr. Ginsburg: Would the Court Reporter please identify that as Plaintiff's Exhibit 15.

(Two-page balance sheet dated December 31, 1970 of Oakland Foundry Co., Inc., was marked as Plaintiff's Exhibit 15 for Identification, as of this date.)

Q. Do you remember, sir, if the bank ever received what was identified as Plaintiff's Exhibit 15, or the original thereof?

A. I know that this was in my file that I personally received it. When I received it, I do not recall.

Q. Now, do you have in your files any other 1970 financial statements of either Electronic Cabinets, Inc., H. W. Brede Co., Inc., or the individual financial statements of Herman and/or Betty Brede? [105] A. I would have to search.

Q. Could you, please? A. I have the Oakland Foundry December 31, 1970 and Electronic Cabinets March 31, 1970.

Mr. Cooke: That's it.

Q. May I see the one for Electronic Cabinets, Inc.?

This is a balance sheet. Do you have a profit and loss statement? A. That's the only one we have.

Mr. Ginsburg: This appears to be an original.

Can we have this marked as Plaintiff's Exhibit 16.

(Balance sheet dated March 31, 1970 for Electronic Cabinets, Inc. was marked as Plaintiff's Exhibit 16 for Identification, as of this date.)

Q. Subsequent to the receipt of Plaintiff's Exhibits 15 and 16, did the bank receive any other financial statements, including balance sheet and profit and loss statements, of either Electronic Cabinets, Inc., H. W. Brede Co., Inc., Oakland Foundry Co., Inc., or Herman and Betty Brede individual financial statements? [106] A. I would say that we did not or I would have them here.

Q. Do you know the reason why, if any, such financial statements were not sent to the bank? A. Well, we did not ask that they be discontinued. However, we were on a collateralized basis with the balance of our loan.

Q. The stock of Electronic Cabinets, the stock of H. W. Brede Co., Inc., and the individual guarantees of the two obligors? A. And the second mortgage on the premises that we took.

Q. Right.

Now, you stated earlier that subsequent to the receipt of Plaintiff's Exhibit 15, Mr. Brede came to the bank to discuss the clean-up of his loan? A. Yes.

Q. Do you remember when that discussion took place, sir?

First of all, do you have an independent recollection of when it took place, before you look at your documents? A. Not as a date, if that's what you want.

Q. Yes. [107] A. No, I don't.

Q. In terms of a month or time of year? A. Oh, the early months of the year, yes.

Q. The early months of '71? We are talking about subsequent to the receipt of Plaintiff's Exhibit 15. A. Oh, 1970. Here we go again.

Q. "Here we go again" with what? A. I am switching from the '69-'70—maturity dates are getting me confused on here again.

Q. I am talking about Plaintiff's Exhibit 15.

You stated that there was a conversation that Mr. Brede had at the bank with you subsequent to the receipt of it or at or about the time of the receipt.

Do you know when that took place other than checking your records to determine that date? A. When I said, "Here we go again," when we refinanced it, it would have been the early months of '70 into a collateralized loan.

At that point, I don't feel I had a conversation with Mr. Brede in connection with this receipt of this 1970 statement.

Q. Well, you are talking about what happened on the first anniversary date. A. That's what I reflected back on, yes.

[108] Q. I am talking about what happened on the second anniversary date, obviously. A. No, I don't recall having had any conversation but I would have to check carefully to see if I have anything in my notations here which indicated I spoke to him after December 30, 1970.

Q. Wasn't the initial loan collateralized? A. With just the stock and the guarantees.

Q. So the additional collateral given here has been the second mortgage on the house? A. Yes.

Q. And that was at the time of the second anniversary date? A. Yes.

Q. Can you refresh your recollection based upon your documents in your possession with respect to the substance of the conversation which occurred between you and Mr. Brede at or about the time of the receipt of Plaintiff's 15 which related to the year end 1970 for Oakland Foundry? A. I have no recollection of any conversation with Mr. Brede at that time.

Q. I see. You had no—did you have any conversation with Mr. Brede or a representative of Oakland [109] at or about the

time of the second anniversary date of the instant loan? A. I don't recall. I would have to look—I don't recall.

Q. Well, would it have been normal banking procedure for you to have a clean-up discussion with a borrower at the time of the anniversary date for each loan? A. Well, no. In this instance, it could have taken place but it did not simply because we had swung it over from a time loan to a demand collateralized loan in which instance, the borrower is billed quarterly for interest expense, and this is where we keep the running check on it, see if the interest payments are kept current.

Q. Is there a difference between a time loan and a demand loan with respect to whether or not the loan is self-liquidated? A. Is there a difference?

Q. With respect to your bank? Do you have different banking procedures with respect to whether or not a loan is self-liquidated if it's a time loan as opposed to a demand loan? A. A demand loan is usually given more time [110] for liquidation purposes. It's long-term credit, where a time loan is really geared on a commitment of repayment and this is what took place here.

Q. There are no distinguishing factors with respect to whether or not it's going to be self-liquidating? A. We would like to relate to the collateral at hand to show it has the asset or net worth values in liquidation of a collateralized loan.

Q. During the period from January 16, 1969 through the end of 1969, this loan was not liquidated in any respect, was it? A. No.

Q. Interest payments were made but principal was not? A. That's correct.

Q. Now, at the time that it was changed from a time loan to a demand loan, was there an understanding as to whether or not the borrower would liquidate the loan with respect to principal? In other words, amortizing. A. That would have been.

Q. "Would have been"? A. Would have been. I cannot quote what might have been discussed but I can say that.

[111] Q. In words or substance. I don't need a quotation. A. In essence, we would have relied on his statements as to the progress of his business and eventual pay-out of the loan.

Q. Now, this conversation would have occurred at or about the time that the form of the loan was changed from a time loan to a demand loan? A. Yes.

Q. Which occurred at what point in time? A. In the early months of 1970.

Q. At or about the time of the first anniversary date? A. Yes.

Q. Now, do you have any recollection as to what was said, if anything, pertaining to the liquidation of the loan after the first anniversary date along the lines that we have just discussed? A. One of the pertinent factors was that he was still very optimistic on a turnaround of his business and general economic conditions, that the pay-out would come from the sales that he would be able to generate.

Q. But was he discussing the pay-out in terms [112] of the payment of interest or the payment of principal? A. Payment of principal, because the payment of interest is an ongoing obligation.

Q. Did the bank set up a payment plan for Oakland——
A. No.

Q. ——with respect to the instant loan subsequent to the first anniversary date? A. No.

Q. What, if anything, was the reason why such a payment plan was not set up if it was agreed that the borrower would repay principal as well as interest after the first anniversary date? A. We relied again that his company would generate sales to pay off the debt.

Q. Was there an understanding, either orally or in writing with respect to the dollar amounts that Mr. Brede's company would be obligated to pay both principal and/or interest subsequent to the first anniversary date? A. Not a set amount, no.

Q. An approximate amount? A. No, because a demand loan, you have full privileges at anytime.

[113] Q. To make calls? A. We do. But the borrower has full privileges to make reductions——

Q. Without penalty? A. Oh, yes. He is free to do so.

Q. You are telling me what the bank had the right to do and what Mr. Brede had the right to do and I questioned you, sir, with respect to any conversations that you had with him with respect to his or its obligation to repay the loan both principal and interest after the first anniversary date. A. There were no specific increments of payment made. We knew that he was—we knew that his business had run into difficulty principally because of the trucking strike that had occurred and deliveries were not being made and shipments were not coming in.

This was the crux of his problem to start with.

This was just a question then for these projects that he had mentioned to us were underway, multiple housing, campus dormitories, etcetera, that these sales would affect or would come about and hopefully that his sales would be sufficiently high to not only carry his present obligation in interest, [114] but to make reductions against the loan.

Q. When was the first time that you heard that there was a truck strike which affected the business of Oakland? A. I can't give you a date on that.

Q. Was that at or about the time of the first anniversary date of the loan? A. No, it was during the course of the renewals of the first advance of dollars.

Q. In other words, it could have been at the expiration of any of the three-month periods prior to January 16 of 1970? A. Right.

Q. How did it come to your attention that in fact the truck strikes had affected Oakland? A. By conversation with Mr. Brede.

Q. Do you remember the first time that such a conversation took place? A. No.

Q. Do you have any memorandum which recorded that conversation? A. I—it's possible that it could be included in one of my memorandums.

Q. In a credit memo? [115] A. Yes, an updating memo.

Q. Do you remember what, if anything, precipitated the conversation which included the reference to the truck strike in it? A. No, I don't know what might have—just as an explanation on his part as to the fact that he was on a continuing loss operation and he was not able to make any reductions although we were—he was not committed to a reduction.

The only commitment he really had is that he would be cleaned up by the anniversary or by the end of the year.

Q. And, in fact, he was not cleaned up as you said? A. No.

Q. And was there another conversation in or about January of 1970 when he came in and he said that the loan was not cleaned up and that he just couldn't clean it up at that time? A. Yes. There would have been a conversation then.

Q. What do you remember about that conversation and who was present? A. Well, I would have been the only one present. [116] I am pretty sure there was no one else with me there at that time.

Q. Bill Arnold? A. No, he would not have been. It would have been just myself and essentially would have been to call

to his attention—we had reached a point where the clean-up was expected and we would look for him to clean up his loan.

Q. Did he make any oral commitments to clean it up in terms of making any statements to you other than extending—other than giving a second mortgage on his home? A. No, he made no commitments.

Q. Did he advise you that the receipt of commissions which had been reflected on the earlier financial statements of Oakland Foundry had not come about? A. No, I don't recall that he advised me of that, no.

Q. Did you question him with respect to that? A. No, I didn't—that I can recall.

Q. Did you ever question him in 1969 or 1970 with respect to the accounts receivable of Oakland Foundry? [117] A. No, I don't recall that I questioned him about it. I would have looked at him in my own interpretation of figures as they related to other figures in it.

Q. Did you relate that interpretation of figures, relate to accounts receivable of Mr. Brede? A. I feel that I must have.

Mr. Cooke: Do you recall specifically doing that?

The Witness: No.

Mr. Cooke: That's your answer.

Q. Well, did you ever question Mr. Brede as to the age of the accounts receivables of Oakland? A. No.

Q. Did he ever speak to you with respect to the age of the accounts receivables of Oakland? A. Not specifically, no.

Q. Generally speaking? A. I don't believe he had. If I could just volunteer this—

Mr. Cooke: You don't have to volunteer.

Q. Did you have any conversation with respect to the accounts receivable of Oakland with Mr. Brede in or about

1969 or 1970? [118] A. Just on the slowness of this truck strike.

Q. Did he explain to you that the truck strike was affecting Oakland's business so that it was unable to earn income for certain periods of time? A. No. Only that it wasn't able to produce or get raw materials.

This is how I am relating it to the receivables.

Q. I see.

Did you know that the business of Oakland required that it did produce an order to—that it did produce with the raw materials that it was supposed to be receiving in order to earn some income? A. I guess you will have to repeat that.

Q. Let me rephrase it.

Were you aware of the fact that without raw materials being shipped to Oakland, that it could not produce a product in order to make income, in order to earn income? A. I would have to assume that would be the case.

Q. Did Mr. Brede ever advise you that that was the case, that the truck strike had interdicted the supply of raw materials to Oakland? [119] A. Other than that it was a complication in his operation.

Q. Did he explain to you in words or substance the length of time of that truck strike which interfered in some respects to the operation of Oakland? A. No.

Q. Well, did you ever bring it to his attention in any way, shape, manner or form that the truck strike was something about which he should be concerned with respect to the payout of the instant loan? A. I don't think I questioned him on that. I think he probably told me more about it than I would have asked him.

Q. Do you remember anything other than what you previously testified to today pertaining to the truck strike? A. No.

Q. Were there other elements which Mr. Brede explained to you, whether they were within his control or beyond his control, which adversely affected the business of Oakland during 1969 or 1970? That would include labor problems, an act of God, et cetera. A. No, nothing of that nature.

Q. Nothing other than what you have just testified [120] to about the truck strike? A. Right.

Q. Did he explain to you whether or not this was a local problem? A. I don't ever remember him saying whether it was local or widespread.

Q. You have no independent recollection as to whether or not there was a nationwide truck strike at the time? A. No, I don't. I don't remember whether it was localized or whether it was national, now.

Q. I see. Now, we identified earlier Plaintiff's Exhibit 15 which shows at page 2 thereof a loss on the part of Oakland for the year ended 1970 in the sum of \$44,194.

Do you remember having a conversation with anyone at the bank with respect to the financial condition of Oakland upon receipt of the said financial statement or subsequent thereto? A. No, I don't recall any conversation with them.

Q. Do you have any memorandum which would reflect that you focused on this particular financial statement at or about the time of its receipt and had [121] analyzed it as such? A. I would have to look back, really. This would be after December 31, which would be early '71.

Q. Correct. A. I think the conversations had almost ceased then.

I tried to get this file in order but it's been taken apart so many times for duplication. I am concerned that some of the pages might be out of order.

I appear not to have——

Q. You stated that the conversations had stopped by then?

A. I don't recall in the interim a conversation so I would say yes.

Q. Were there conversations which had transpired between the first anniversary date and the end of 1970 between yourself and Mr. Brede as to which you have not previously testified insofar as they relate to the loan in suit? A. This is 1970——

Q. Well, we are talking now about the conversations which took place after the first anniversary date and prior to the receipt of Plaintiff's Exhibit 15 which is essentially the year of 1970. [122] A. I don't believe I had any conversation with Mr. Brede after receipt of this statement.

Q. After the receipt of Plaintiff's 15? A. I don't feel I had any conversation with him at that time, no.

Q. Well, you obviously did at a later time, later in 1971? A. Yes.

Q. I am not going into that now. I am going into what happened in 1970 between the second anniversary—between January 16, 1970 and the end of the year 1970, as to which you have not previously testified, oral conversations between yourself and Mr. Brede relating to the loan in suit, if you can recall. A. Loan and suit?

Q. Loan in suit. The \$125,000 commitment. A. The only conversation which would have taken place was a conversion of the time loan to a demand loan and the additional collateral.

Q. Anything else? A. No. We moved to put ourselves in a better position.

Q. All right. Now, was this move something [123] which was determined between you and the other board members of the defendant bank? A. Yes.

Q. At a regular board meeting? A. No, it would have been just a loan review.

Q. Now, is it normal procedure for the loan of a corporate borrower to be reviewed on a periodic basis with the defendant bank? A. Yes.

Q. And was this loan periodically reviewed? A. On a three-month basis from its inception, yes.

Q. So there would have been at least three review periods of this particular loan subsequent to the first anniversary date and during the year of 1970? A. Not the full year of 1970 because we converted in '70.

Q. Well, you converted to a demand loan? A. That's right.

Q. Upon conversion from a time loan to a demand loan, does that ipso facto cause the loan not to be reviewed by the loan committee as part of your normal banking procedure? A. Well, that is too general a statement.

[124] Q. Well, if you can describe your banking procedure better than I, I ask you to do so. A. When we collateralize a loan, it does reduce itself to periodical interest payments that would come due on a loan. A failure to make the interest payments would alert us to bring the people in.

Q. That answer I don't think is responsive.

I am talking now about periodic reviews by the bank during 1970 subsequent to the time that the loan was converted to a demand loan. Were there any? A. Not after that period.

Q. Not after then. Well, hasn't it been your testimony that the loan was in fact collateralized prior to the time it became a demand loan? Weren't you holding the stock? A. Yes, we were holding the stock of the corporation, yes.

Q. Wasn't that collateral? A. Yes, for the value that it represented, which we felt was insufficient to secure ourselves well.

Q. Who appraised the value of the stock? A. Quite generally we would, as a group.

Q. Do you know the person individually who appraised the value of the stock?

[125] Mr. Cooke: He just said that it was a group.

A. It was a committee.

Q. You being a member of that committee? A. Yes.

Q. Do you remember the criteria which went into the evaluation of the stock? A. When it's a closely held or individually held corporation, the value of the stock can be determined—is determined best, that you can, from the financial statements. They relate to the net worth of the statements.

We go beyond that. Whenever it is an individually held corporation and relates directly to the individual to see what the combined strengths are and this happens in every instance of an individually held, closely held corporation.

Q. Did you or the committee which evaluated the stock of the two corporations place a dollar value on it? A. Not essentially. Just as it related to the net worth of the corporation.

Q. But at some point, at the time it was changed to a demand loan, it was determined that [126] additional collateral was necessary? A. Yes.

Q. What factor, if any, caused the committee—loan committee to make that determination? A. Primarily that the commitment was not kept and the loan was not paid off as were the conditions on the original advance.

Q. Meaning that it wasn't paid within a year? A. Yes.

Q. Did the consideration of the fact that Oakland Foundry had not earned a profit in the last several years enter into that decision? A. It most certainly did.

Q. Did the consideration that there was a truck strike which affected the ability of Oakland to produce its products go into that decision? A. Just as a background knowledge of economics, that might affect their operation.

Q. Did any other factors go into that decision to increase the collateralization of the subject loan other than those which you just testified to? A. Yes. We had the guarantee of H. W. Brede Co., Inc. as well supporting this loan, and there were net values there, net worth of that corporation that [127] we were taking into consideration.

Q. Do you remember what the net value or the net worth of the H. W. Brede Corporation was? A. At that time, no.

Q. Did you have its financial statements before you? A. We had the original statements before us.

Q. The statements as of the fiscal year then ended closest to the time that you were evaluating whether or not additional collateral was going to be required by the defendant bank? A. That would be so, yes.

Q. You would have had those statements? A. Yes.

Q. Do you have those statements with you today, the ones that were reviewed at that time? A. Yes, I do, a December 31, 1969 H. W. Brede Co., Inc.

Mr. Ginsburg: Could we identify that, sir, as Plaintiff's Exhibit 17.

The Witness: It's the original.

(Balance sheet dated December 31, 1969, H. W. Brede Co., Inc., was marked as Plaintiff's Exhibit 17 for Identification, as of this date.)

[128] Q. I have before me a balance sheet. Did you have at that time an income statement for H. W. Brede Co.? A. Yes. This is the balance sheet. It isn't titled but it must tie in because it speaks about——

Q. That's an income statement? A. Yes.

Q. For H. W. Brede? A. Right. There is no heading on it.

Q. For a period other than the balance sheet which I have before me—— A. It says fiscal 1969.

Q. Is it an income statement? A. Yes.

Q. And the balance sheet is for the December 31, 1969 period? A. Yes.

Mr. Ginsburg: Can we mark the P & L——

Q. First of all, let me ask you how you know that the P & L for the year 1969 relates to H. W. Brede Co.? A. You can see those clips at the top. Those two statements would be together.

Mr. Ginsburg: All right. Then, could [129] this profit and loss statement for fiscal year 1969 be identified as Plaintiff's Exhibit 18, and let the record reflect that it is a financial statement of Herman W. Brede Co., Inc.

(Profit and loss statement for fiscal year 1969 for the Herman W. Brede Co., Inc. was marked as Plaintiff's Exhibit 18 for Identification, as of this date.)

By Mr. Ginsburg:

Q. I notice that at the end of 1969, just prior to the first anniversary date, the Herman W. Brede Co. had a net worth of approximately \$163,000; is that correct, sir? A. Yes, capital equity, yes.

Q. And nevertheless, it was still determined by the bank that the bank's financial condition needed to be more secure through the giving of a second mortgage by Mr. Brede on his house? A. Yes.

Q. At the time of the first anniversary date, had Mr. Brede or one of his companies completely satisfied the loan on the 1964 Owens cabin cruiser, extended by the bank? A. I know

we extended a loan for that purpose. That would be another department but we could check [130] that for you.

Q. I would like to know if that loan had been repaid at that time. A. That was extended in '64.

Q. Right. A. Right. And on June 3rd, 1966, the final payment was made—hold on a second—the final payment on that was received—the final installment was received on March 18th of 1969.

Q. Was that loan—— A. It was a five-year loan.

Q. So the final payment was received two months after the loan in suit was executed? A. Yes. At the time the loan was executed, which would have been in January of '69, the balance was \$3465.

Q. Out of a total loan of—— A. Total loan, that's right, with interest included, \$29,000.

Q. Was that loan collateralized by anything other than a chattel mortgage against the boat? A. That is all, and guarantees of the principals.

Q. Being Herman and Betty Brede? A. Herman Brede. This loan was to the corporation.

[131] Q. That was a time loan? A. Yes. Regular installments.

Q. And that loan had a sixty-month pay-out? A. Yes.

Q. And those were the terms of the loan from its inception? A. Sixty months at \$495 per month and it was clean all the way through.

Q. It was a self-liquidating loan? A. Yes, monthly payments.

Q. By January of 1969, had the payments been completed with respect to any other chattels which Mr. Brede or any of his companies had obtained loans from the bank for either their purchase or their improvement?

Referring to a 1964 Oldsmobile, a 19—— A. There was one loan as we advised you that was still open. It was a loan—an automobile loan, you are right, on—that was still open with a balance remaining of \$1588.36 on January 1st, which would have been—that was still an open balance on the 16th, yes.

Q. On an automobile owned by Herman W. Brede Co.? A. Yes.

[132] Q. Is that a '64 Olds? A. That was an automobile loan. I would have to go back to the records and identify it.

It went on in November of '66. So I doubt it was a '64 Olds. It would have been a '66 car more likely.

Q. Well, do you know the outstanding indebtedness owed to the bank by Brede and Company on or about January 16, 1969 with respect to that prior automobile loan extended by the bank? A. Yes, that was the figure I just mentioned, the \$1588.36.

Q. Was that subsequently repaid? A. That was paid out on November 10th of '69 in just normal monthly payments.

Q. That was collateralized by nothing other than the chattel itself? A. That's right.

Q. As well as the individual guarantees? A. Always get the individual guarantees.

It was corporate loans.

Q. So is it your testimony that as of January 16, 1970, the first anniversary date of the \$125,000 loan, there were no outstanding loans that the bank had [133] with either Herman Brede, Betty Brede, H. W. Brede Co., Inc., Electronic Cabinets, or Electronic Cabinets, Inc.? A. You said that I have already testified to that?

Q. No. I am asking if that is the case? A. Other than what you have just reported to me?

Q. Well, no. You just reported to me that the loan on the automobile was satisfied in November of 1969. I am now going to January of 1970. A. Oh, '70?

Q. Right. Are there any other loans besides the one to Oakland Foundry, the loan in suit, which the bank had outstanding with Mr. Brede, his wife, or any of Mr. Brede's companies? A. No. I would have to say no, that there were no other loans.

Q. There were no other loans. And it's your testimony also that there were no other loans which required the collateral that the bank required with respect to the \$125,000 loan of Oakland Foundry? That is the collateral with respect to the \$125,000 loan was much more exacting and to a greater extent than the collateral with respect to the prior loans the bank [134] had with Herman W. Brede Co. or Mr. Brede individually? A. I find it a difficult question.

You are saying that the collateral that we had on the 125 was greater value as it related to the loan than the cars did as they related to the loans, their loans; is that what you are asking?

Q. What I am saying is that the collateral with respect to the loans other than the \$125,000 loan related only to the chattel itself? A. That's right.

Q. Whereas the loan with respect to the instant matter related to several different types of collateral that you never had with Herman W. Brede Co. in the past? A. Yes, that's correct. Yes.

Q. So as of the end of 1970, Electronic Cabinets, Inc., Herman W. Brede Co., Inc., and either Herman Brede or Betty Brede individually had no outstanding loans with the defendant bank? A. Not that I am aware of, no. I don't believe there were any, but I am not aware that there might have been.

Q. Other than the first mortgage on their house? Or was that with an insurance company? A. I thought you were relating only to loans [135] we had extended to them.

Q. That was the question. A. Well—yes. The only loan that I knew that they had outstanding—that I had no knowledge that I can recall of any loan outstanding of either the corporation or the individuals at that time, other than as I reported at the initiation date. That automobile date, \$1588 automobile loan.

Q. I am speaking at the end of 1970. A. No knowledge of it.

Q. No knowledge of any loans with Mr. Brede, his wife, or any of his companies, other than the Oakland \$125,000 loan? A. With us?

Q. That is correct. And the bank was not the mortgagee on the Upper Brookville house with respect to the first mortgage? A. Was not.

Q. Its only lienholder status pertained to the second mortgage executed in 1970? A. Right.

Q. How, did the bank have any knowledge during 1970 with respect to any indebtedness of Oakland where the bank was not the creditor? [136] A. Well, we did. We knew that they had a loan with St. Clair National Bank.

Mr. Cooke: That wasn't the question.

The question was, did you know of any other indebtedness.

Q. It calls for a yes or no.

Mr. Cooke: That's right.

A. Yes.

Q. What did you know in that regard? A. That there was a loan with the St. Clair National Bank.

Q. What particulars did you know of that loan, if any? A. I knew that there was a loan directly to St. Clair and that there was a mortgage involved on the real estate.

But then there was an SEA that came into the picture, SBA loan, and I do not know how it was then restructured.

But those two loans came to my knowledge during the 1970 period.

Q. You testified a moment ago there was a loan to St. Clair. You mean from St. Clair bank to—— A. The Oakland Foundry.

[137] Q. Did you know the amount? A. I cannot recall the amount but apparently it was the St. Clair Bank had reached its legal limitation, which could not be exceeded, which is one of the reasons I suppose that Mr. Brede also was interested in our credit advance.

Q. Did he state that as a reason at anytime? A. We discussed it.

Q. You discussed the legal limit of the St. Clair National Bank with respect to its ability to lend monies to Oakland Foundry? A. That came into discussion but I also discussed it with one of the principals of the St. Clair Bank working it out on credit.

Q. Working what out on credit? A. Well, for us to consider the credit that we were extending.

Q. At the time of the initial making of the loan? A. Yes.

Q. As well as at the time of the first or second anniversary? A. No, the second anniversary I did not get into that question. We had one intent at that time.

[138] Q. What about the first anniversary? A. I was aware that there was a debt with St. Clair. I can't give you the amount.

Q. Was there a quarter of a million dollar loan? A. It was much less than that.

Q. Was this a loan that was subsequently guaranteed by the Small Business Administration? A. This is what I say. It could have been subsequently. I don't know how they restructured that loan.

Q. What was the extent of your knowledge with respect to the lien which the bank had against the real estate of Oakland?

Mr. Cooke: Which bank are you referring to?

Mr. Ginsburg: St. Clair.

Q. Which you just testified to. A. Other than they did have a loan against the real estate.

Q. Real estate owned by Oakland Foundry in Belleville?
A. Yes.

Q. To your knowledge, was the lien against the real estate of Oakland ever released by the St. [139] Clair bank? A. I don't know.

Q. At the time that the loan the defendant bank had with Oakland was changed from a time loan to a demand loan, was the fact that the Oakland real estate was encumbered in some respect by an obligation to the St. Clair Bank brought to the attention of the defendant's loan committee? A. I would feel that it had been but I have to refer and see how I expressed it.

Q. Is there something in your file which would reflect such a conversation if it took place? A. It could be.

Q. Would you please search it. A. I just simply have there is an open mortgage on the Oakland property held by St. Clair National Bank.

Q. Do you have a reference there to the SBA loan? A. Not at origination.

Q. No, but in your June 18, 1970 credit memo? A. Yes, I do refer to an SBA loan at that time.

Q. Can you tell me, sir, what, if anything, does your June 18th memo, 1970 memorandum, do to refresh your recollection with respect to the SBA loan? [140] A. I cite here that repayment of the SBA loan is at \$3600 per month. It goes on to say that the mortgage on the premises is on a non-amortizing basis for three-year period, and thereafter the amortization would commence.

This is the restructure of their loan out there so I don't know the particulars.

Mr. Goldman: Has that document been marked for identification?

Mr. Ginsburg: I don't think so. I think we should.

It will be Plaintiff's Exhibit 19.

Q. Could you identify what the handwritten delineation is in the upper right-hand corner of the note? A. This is, "Approved board of directors meeting 8/6/70."

In other words, at this time, for the renewal, conversion to demand, I actually took to the board rather than to a loan committee but I cannot tell you whether it was a matter of convenience or whether it was for any other reason.

Q. Were there any board of directors minutes with respect to the August 6, 1970 directors meeting? [141] A. It would cite that they approved this loan.

Q. Well, anything other than what you have just shown me? In other words, were there normal minutes? Was there a secretary sitting there and taking notes? What is the procedure like? A. Oh, minutes of the meeting would be taken.

Q. Right. A. And the loan would be recorded as approved or not.

Q. Well, are there directors' minutes with respect to the August 6, 1970 meeting insofar as they pertain to this loan? A. Yes, I would say there would be.

The action of approval by the board would indicate that there are—that it was submitted and it was approved.

Q. Well, I call for the production of those directors' minutes and do you have them with you? A. No.

Mr. Ginsburg: Let us mark this as Plaintiff's 19, a credit memo dated June 18, 1970, two-sided.

(A credit memo dated June 18, [142] 1970, two-sided, was marked as Plaintiff's Exhibit 19 for identification, as of this date.)

Mr. Ginsburg: I call for the directors' minutes and/or any committee minutes of the defendant bank insofar as they relate to the subject matter of the loan in suit, either the granting of the loan or any alleged problems with payment of the loan, the amortization of the loan or the eventual purported right to set off the loan.

I take it that I have not been shown copies of those minutes and I have just been advised that same exist.

Will they be produced?

Mr. Cooke: If they exist, Arthur, they will be produced. If they weren't, it was a mere oversight and they will be produced promptly.

Mr. Ginsburg: I am not going on a fishing expedition. Only insofar as they pertain to the loan.

By Mr. Ginsburg:

Q. Do you have any independent recollection of the directors meeting which took place on August 6th of 1970 insofar as it relates to the subject loan? [143] A. I recall nothing more than what is on here. This is essentially the material that would have been related to them.

Q. Now, my original inquiry related to obligations which Oakland had with creditors other than the Glen Head Bank.

You were aware, sir, in 1970 of an obligation which the bankrupt had with the St. Clair National Bank.

Apparently, from your memo of June 18th, 1970, identified as Plaintiff's Exhibit 19, you were also aware of an SBA obligation to the extent of \$3,600 per month for a three-year period; is that correct? A. Yes I would be, because I have noted it as such.

Q. Were you aware of any other loans or obligations which Oakland had in 1970 other than those two obligations? A. St. Clair and SBA?

Q. That's right. A. I do know that he had mentioned that there was—that he was financing receivables in with a factoring organization. I cannot identify the organization or the dollar amount.

[144] Q. Well, did he tell you whether or not the factoring was on a non-recourse basis? A. No.

Q. Did you feel that that was a pertinent inquiry to make? If he is factoring his accounts receivables, he is getting the money for a piece of paper which represents that his company is going to get some money at some point in time; is that not so? A. Yes.

Q. And the lending institution is giving him monies and if it's on a non-recourse basis, he wouldn't be obligated to the factor in the event the monies would not be collected; is that not the case? A. I don't recall if these were assigned to the factor whether it was a recourse agreement—in other words, if receivables were not paid, whether the company had a right to buy them back.

I don't know if that agreement existed.

Q. I am asking you whether you were aware of an arrangement between the factor and Oakland that in the event that the receivable is not collected by the factor, that the factor could

not proceed against Oakland for any monies that it had originally advanced to Oakland on it. [145] A. I am not aware.

Q. So you are not aware if the factoring was done on a recourse or non-recourse basis? A. That's right.

Q. If you are talking in terms of an obligation which Oakland had to a factor, that presupposes that the receivables were factored on a recourse basis; does it not?

Mr. Cooke: He didn't testify that there was any obligation to the factor. He just said that he knew there was a factor.

Q. But my question related to whether or not there were obligations which Oakland had, to your knowledge, during the year 1970, and you included an obligation to a factor. A. Yes.

Q. Do you still believe that there was an obligation which Oakland had to a factor in 1970? A. It apparently existed at the origination or was in existence. I don't know when he brought them in.

Q. Did he tell you if that was a New York or an Illinois factor? A. No.

[146] Q. Did he tell you that—when I say “he,” I am referring to Herman, Mr. Brede—did he tell you that Oakland owed money to Electronic Cabinets, Inc.?

Mr. Cooke: If you know.

A. I would have to refresh my memory. I don't recall.

Q. Would you do so. A. I have nothing that shows me that—that Oakland Foundry owed Electronic Cabinets.

Q. Nothing? A. That I can recall.

Q. Nothing you recall.

I show you, sir, Plaintiff's Exhibit 8, which has previously been identified on October 23, 1974, and can you tell me, sir, whether or not you were aware of an obligation to Electronic

Cabinets in 1969? A. Yes. It appears that Oakland owed Electronic Cabinets \$54,500.

Q. So there was an obligation? A. Yes.

Mr. Cooke: As reflected by this statement.

Mr. Ginsburg: Right.

[147] A. By this financial statement, right.

Q. Do you know if that \$54,000 obligation to Electronic Cabinets was subsequently paid down by Oakland? A. Well, again, I don't recall how the loan was restructured—after the SBA loan was granted, I don't know how the entire loan situation was restructured.

Q. Electronic Cabinets was the parent of Oakland, was it not? A. Right.

Q. Do you know if the debt of Oakland to Electronic Cabinets was superior with respect—in terms of the debt that Oakland owed to the bank in terms of who would have the first lien? A. No, I don't—

Mr. Cooke: Which bank—

Mr. Ginsburg: The defendant bank.

Q. You have no recollection of whether or not the indebtedness was subordinated, the indebtedness owed by Oakland to Electronic Cabinets? A. As we took subordination of existing debt, yes.

Q. You did? A. Yes, we did. Subordination agreements.

[148] Q. Was that the only case when the bank took subordination agreements? A. Yes, at the origination of a loan, we took subordinations, at that time.

Q. At anytime, did you take a subordination from the SBA with respect to its indebtedness? A. No.

Q. Did you attempt to do so? A. No.

Q. Did you take any subordination with respect to the St. Clair Bank's indebtedness? A. No.

Q. Did you attempt to do so? A. No.

Q. Did you have discussions in 1970 with Mr. Brede with respect to the working capital situation of Oakland Foundry in light of Oakland's obligations to the SBA? A. I don't recall if there were discussions. I know I had my concerns.

Q. Did you voice those concerns? A. Just simply that the total debt might prove too heavy for him to carry, the cash flow.

Q. To whom did you voice that concern? [149] A. Well, certainly to myself if not to the loan committee.

Q. So you have no independent recollection of expressing that concern during 1970 to the loan committee? A. I hardly feel that I would have thought of it and not conveyed it but if I did, it would be in memo form.

Q. Do you have such a memo with you today? A. No, this is 1970 you are speaking of?

Q. Correct, correct. And it relates to your discussions with the loan committee with respect to the working capital situation of Oakland. A. I have a memorandum of January 16th of 1970. I don't come out directly, as you are asking in the question. Just cognizant that the SBA loan had been granted and I feel my own concern with this loan, my opinion in the detail I reported.

Q. Your memo refers to a quarter of a million dollar loan and monthly pay-out of \$3,500 at eight and a half per cent interest over an eight-year period? A. Right.

Q. Now, when were you first made aware of that financial obligation on the part of Oakland? [150] A. This might well have been in it.

Q. In or about January 1970? A. Yes.

Q. Which apparently is the first anniversary date of the Oakland loan with the defendant bank? A. Yes, 16th.

Q. Now, what expression, if any, was voiced either at a formal or informal loan committee regarding the working capital situation of Oakland in view of its other indebtedness? A. I cannot recall what I might have expressed.

Q. Do you recall what, if anything, others expressed? A. No, I don't.

Q. Who were the members of the loan committee of the defendant bank during 1970? A. They would vary. We had access to a group from the board who would be called upon to act with a lending officer.

Q. Do you remember any of the names of the persons who may have served on the loan committee during that calendar year? A. I think I have already given that the last time but at origination, it would have been a [151] Mr. Shaknis, a director, myself, and a Mr. Martin.

Q. They are directors? A. They are directors, would have acted with me.

Q. Do you remember if either of those two gentlemen expressed a concern with respect to the working capital situation of Oakland in view of its other indebtedness? A. In agreement to my concern, yes.

Q. Meaning that—— A. They acted with me in my attitude to secure ourselves.

Q. In terms of words, can you remember what was said? A. Not their comments, no.

Q. In general as opposed to specifically what they said. A. Generally, if we could improve our situation, we should do so.

Q. And was this subject discussed at more than one meeting in 1970, that is, the outstanding indebtedness of Oakland

to other obligees? A. Not that as much as a continuing loss experience that he was having.

Q. That Oakland Foundry was having? [152] A. Yes.

Q. Was there a discussion between you and any of the other members of the defendant bank—and I use the term loosely, that includes an employee as opposed to just an officer—with respect to the bank account which Oakland had with a bank in Belleville, Illinois during 1970? A. 1970—

Q. After the first anniversary. A. I don't know that I specifically discussed their account during 1970.

Q. Well— A. With another employee.

Q. Or another officer? A. I don't recall if I did.

Q. Do you remember any conversation either in words or substance that you had with anyone at the defendant bank or with Mr. Brede that pertained to Oakland's bank account with a bank in Belleville during that year? A. No, I don't recall any specific or even general conversations regarding their account.

Q. Did you have such a conversation, alleged conversation, with the loan committee of the bank [153] during either 1970 or 1971 with respect to Oakland's bank account with the Illinois bank? A. No, I can't recall any.

Q. Did you have any conversations during 1970 or 1971 with either Mr. Brede or anyone at the defendant bank with respect to bank deposits of Oakland Foundry and where they were to be deposited? A. Not where they were to be deposited—oh, other than we always felt ourselves to be the principal bank because of the fact that the administrative offices were in Glen Head and we were advancing substantial sums that we would have asked them to have their—maintain their balances with us—their account with us.

Q. But you were aware that Oakland also had an account in Illinois? A. Oh, yes.

Q. And you were aware that they also made deposits in Illinois at that Illinois bank? A. Yes.

Q. Did you ever question Mr. Brede as to the extent of the banking activity which Oakland engaged in with respect to that Illinois bank?

Mr. Cooke: Yes or no.

A. Yes.

[154] Q. What, if anything, was discussed between you in that regard? A. Only to the extent that since we were advancing substantial sums, that they wouldn't be left without a cash flow through their account. We would have balances in our account that related reasonably to the dollars we were advancing as a loan.

Q. Well, when, if at all, did you first have such a conversation with Mr. Brede, conversation that you just referred to? A. It could have been in inception or could have been in time subsequent to it because it's an ordinary, normal sort of an expectation wherever creditors extend, to have balances or have the account of balances with us.

Q. Was that expectation expressed in the form of requiring the debtor to have a compensating balance at the defendant bank? A. To maintain balances.

Q. Was it ever expressed in the terms of having the compensating balance in a specific percentage? A. No.

Q. At any percentage? A. At any percentage.

[155] Q. Was it ever expressed to have a compensating balance? A. The term "compensating balance" is descriptive in its sense that our approach is that it would be reasonable as it relates to the credit.

Q. Was it a requirement that the debtor maintain a compensating balance at the Glen Head bank? A. It wasn't essentially.

Q. During 1970—— A. Yes?

Q. ——you testified last time that the balance at the Glen Head bank was down to as low as a thousand dollars, \$1,047.27. That was for the last three months really of 1970.

But even as of September 1970, as well as August and July of 1970, the balance had gone down to \$5,824.36.

Were you aware that the balance was at that level in the middle of 1970? A. I only know that his balances were low although the——

Q. Yes. Although what?

Mr. Cooke: Did you know that at the time he asked you?

[156] The Witness: No, not at that specific time.

Q. Did you know it in or about the summer of 1970, that the balance of Oakland's bank account at the Glen Head bank was in the area of \$5,000? A. I could only say that they were low.

Mr. Cooke: Did you know it at the time, during the summer of 1970? That's the question.

The Witness: I feel I would have, yes.

Q. "Low" meaning that the balance on hand was approximately four per cent of the outstanding indebtedness?

Mr. Cooke: At what time?

Mr. Ginsburg: In the summer of 1970.

Mr. Cooke: Well, could you be more specific because in June he had a high of \$23,000.

Mr. Ginsburg: Well, I am speaking in—July 31, 1970, the balance as reflected here on Plaintiff's Exhibit 13, \$5,824.36, and in round figures this would be approximately four per cent, four and a half per cent maybe, of the outstanding indebtedness; was it not?

A. Using your figures.

Q. Yes, using the figures that were reflected [157] on your records with my mathematics, give or take a percentage—but you were aware then that it was approximately four or five per cent on hand as of July 1970 or the summer of 1970? A. I am just trying to be exact. I would never use the term percentage basis—

Q. I understand.

Were you also aware, sir, that the balance during August and September of 1970 at your bank with respect to Oakland's account did not increase but, in fact, continually decreased to the point that it reached \$1,047 at the end of December 1970? A. I will have to say no to that to be exact.

Q. You were not aware of the exact dollar terms but—is that what you are responding to? A. Yes.

Q. And you are also responding to the exact dates?

In general, though, sir, were you aware of the fact that the balance of Oakland's account at the Glen Head bank was less than one per cent of the outstanding indebtedness as of the end of the year of 1970? Yes or no. A. I will have to say no because I—we [158] don't have a daily touch on these balances.

Q. I am not asking for a daily touch.

Did you have an approximate feeling that the balance of the Oakland account with the defendant bank was in the low four-figured numbers, toward the end of the year 1970? A. I will say no.

Q. The records reflect that that was the case according to the defendant's records that have been produced in connection with this lawsuit, and my question that I now intend to pose relates to what discussions, if any, were held between you and the members of the defendant bank with respect to the balance of Oakland at the bank in Glen Head as of the middle to the end of the year 1970. A. I recall no discussion.

Q. You recall no discussions pertaining to the balance of the Oakland account? A. That's right.

Q. Do you recall having any such discussions with Mr. Brede in the middle part or the latter part of 1970 with respect to the balance of Oakland's account with the defendant bank? A. No, I don't recall.

[159] Q. Do you recall the fact of whether or not the balance of Oakland was ever brought up to the loan committee during the middle or latter part of 1970? A. No, I don't.

Q. Was there a discussion held in the middle or latter part of 1970 with respect to the need for Oakland to make deposits on the defendant's bank? A. I don't recall there was.

Q. Was there any discussion during the middle of 1970 between you and the members of the bank and/or Mr. Brede or any of his representatives with respect to Oakland maintaining a higher compensating balance at the defendant bank? A. No.

Q. Was there any discussion in the middle or latter part of 1970 with respect to Oakland depositing monies or starting to deposit monies with the defendant bank in order to better secure the Glen Head bank? A. No, I feel quite certain there wasn't.

Q. Would there be any memorandum that would refresh your recollection in that respect? A. I can search but I don't recall.

I don't appear to have any notations here or memorandum of a discussion at all with Mr. Brede [160] in the latter part of 1970.

Q. During 1971, did you have any conversation with Mr. Brede with respect to making deposits on the part of Oakland with the defendant bank? A. No.

Q. Did you have any such conversations with other members of the defendant bank? A. No, not that I can recall.

Q. Well, I note that in March of 1971 the bank balance at the Glen Head bank was approximately \$4,313—— A. That's '71?

Q. That's correct. And that suddenly in April there are deposits to the extent of about \$47,000.

Do you know what, if anything, caused Oakland to make such deposits with your bank? A. No.

Q. Was there an understanding with Mr. Brede to make such deposits with your bank? A. No.

Q. Was there an understanding with anyone at Oakland to make such deposits with your bank? A. No.

Q. In the month of May of 1971, an additional [161] \$48,000 was deposited with the defendant bank by Oakland.

Do you know what, if anything, gave rise to those deposits with your bank, sir? A. No.

Q. Did you have any understanding with Mr. Brede with respect to those deposits on the part of Oakland? A. None whatever.

Q. Did you have any conversation with Mr. Brede in that regard? A. No.

Q. Did he ever advise you during the early or middle part of 1971 that he was going to make deposits with the Glen Head bank? A. No.

Q. So to your knowledge, the deposits to the extent of about \$100,000, give or take 5 to 10 thousand dollars, which were made during the winter and spring of 1971 with the defendant bank, were deposits made without any prior conversations with Mr. Brede or anyone on the part of Oakland? A. Without any conversation.

Q. Without any prior understanding on his [162] part and your part with respect to the making of such deposits? A. Without any understanding.

Q. These monies were deposited with your knowledge or without your knowledge at the time they came in? A. Without my knowledge.

Q. Did anyone bring to your attention the fact that within a space of a two- or three-month period there was \$100,000 build-up of deposits? A. Not particularly to that amount. It was my own observation.

We have a periodic indication of deposits on hand. When they rise above the \$25,000 level and these reports will flow through so we have a better sensing of our companies, and suddenly I saw that balance appear which indicated that deposits were being made.

Q. To the extent that I have gone into? A. No, just that it was an increase. I can recall thinking, well, he has turned the corner and I was happy to see it.

Q. Well, did you have any conversations with him in this regard? [163] A. No.

Q. Did not at this time travel between Belleville, Illinois and his home in Upper Brookville near New York? A. This I don't know. But he didn't stop in to see me or call or see me.

Q. He didn't stop in in 1971 at all? A. Speak to me?

Q. Yes. A. That I recall, no.

Mr. Ginsburg: Shall we stop here for lunch?

Mr. Cooke: Fine with me.

(Whereupon, at 12:35 P. M. a luncheon recess was taken.)

[164]

Afternoon Session
(Time noted: 1:45 P. M.)

Examination by Mr. Ginsburg (Continued):

Q. Now, my question is, before lunch we focused on any discussions or understanding between you and Mr. Brede with

respect to the deposits made by Oakland during 1971, and you testified that there were none.

Were there discussions between Mr. Brede or someone else from Oakland and someone else with your bank besides yourself with respect to the deposits that Oakland made during 1971 with the defendant bank, to your knowledge? A. To my knowledge, there were none.

Q. Well, who else would be aware of this, to your knowledge?

Mr. Cooke: Aware of what?

Mr. Ginsburg: Aware of any build-up with respect to deposits being made by Oakland during 1971.

Q. Would there be another officer charged with such knowledge who would be aware of it? A. No.

Q. Would there be another person at the bank [165] besides yourself who would have a conversation with Mr. Brede with respect to depositing monies with the defendant bank in order to raise the balance for purposes of better securing the bank? A. Oh, no.

Q. You would be the man? A. Yes.

Q. Would you describe yourself as the only person who had contact with Mr. Brede on behalf of the defendant with respect to the instant loan? A. Yes, that's right.

Q. Mr. Arnold would not? A. No, Mr. Arnold is in another department.

Q. When did you first have knowledge that Oakland's financial condition was materially adversely affected by the business that it was conducting in or about 1971? A. Would you state that again? I think I understand exactly what you mean but——

Q. All right.

When were you first aware, if at all, of Oakland's adverse financial condition, if you were ever aware of it? A. Well, just

as the statements were coming in, [166] there was a loss history. So I felt that they were always in——

Q. In adverse condition? A. Yes.

Q. So meaning that—you got the 1969 statements. Those reflected an accumulated deficit of over \$248,000 I believe? A. Accumulated deficit, I can't remember the exact amount but it was sizeable.

Q. Well, give or take. I don't mean to pin you down on that. A. Right.

Q. I think we have identified an exhibit which shows that as of 1969, I believe, there was a loss—you were aware of the loss during the second quarter of Oakland to the extent of \$11,614 and a couple of odd cents, were you not? A. Yes.

Q. I showed you Plaintiff's Exhibit Number 9, I believe, or is that—— A. 9.

Q. 9. You were also aware of Oakland's loss as represented on Plaintiff's Exhibit 3 to the extent of \$66,000 and a few cents? [167] A. Yes.

Q. You were also aware from Plaintiff's Exhibit 11 that Oakland as of the year ended December 31, 1969 had an accumulated deficit of over \$319,000 and that as of the end of 1969, it showed a loss for that calendar year? A. Yes.

Q. So when you said before all along you were aware of Oakland's adverse financial condition in view of these losses—— A. Yes.

Q. So it goes back to 1969? A. Yes.

Q. At the time of the inception of the loan back in January of 1969, was there an oral understanding or perhaps a written agreement on your part to the effect that in the event Oakland found itself in dire financial condition, that Mr. Brede would see to it that funds were channeled to the First National Bank of Glen Head? A. No.

Q. Did Mr. Brede ever have a conversation with you or did you with him to the effect that Mr. Brede would attempt to prefer the bank over other creditors [168] in the event that there was a rush against Oakland for repayment of any obligations it owed? A. It was never discussed.

Q. That was never discussed. No discussions in any manner relating to that subject? A. No.

Q. Any informal writings to that effect? A. No.

Q. Had you ever had an arrangement with Mr. Brede to that effect with respect to the loan on the automobiles to the H. W. Brede & Co. or the cabin cruiser? A. No.

Q. Did you and Mr. Brede ever discuss the defendant's purported right to set off in the event that the bank deemed it necessary with respect to the calling of a demand loan? A. Never.

Q. Never. Subsequent to the time that the time loan was changed to a demand loan and prior to 1971, did the bank ever have any discussions with respect to calling in the loan?

Mr. Cooke: With whom?

Mr. Ginsburg: With the subject that we [169] are concerned with here, Oakland's \$125,000 loan. That's prior to 1971 and subsequent to the time that it became a demand loan.

Mr. Cooke: My question is, with whom were the discussions to have taken place?

Mr. Ginsburg: Oh, initially in-house with the defendant.

A. I don't recall that we did that.

Q. It was never discussed at a board meeting that one of the possibilities here in order to secure the bank and lower its downside exposure would be to call the loan in 1970 as opposed to waiting and seeing what would happen in 1971? Any discussions to that effect? A. No.

Q. Did you ever advise Mr. Brede in 1970 that the bank was thinking of calling the demand loan? A. No.

Q. Did you ever advise Mr. Brede at or about the time of the conversion of the time loan to the demand loan that if the financial condition of Oakland did not improve within "X" period of months, the bank would call the loan? A. No.

[170] Q. Were there any criteria that you pointed to during your discussions with Mr. Brede at or about the time the loan was converted to a demand loan upon which you spelled out what the bank would do in the event of certain contingencies with respect to calling the loan? A. I don't recall discussing that with him at all.

Q. Would you have been the only person who would have had such a discussion with Mr. Brede? A. Yes.

Q. At the time the loan was changed from a time loan to a demand loan, this was done at your request? A. Yes.

Q. Upon approval of the loan committee at the bank? A. Yes.

Q. And did Mr. Brede state anything at that time in words or substance to the effect that now we are having a demand loan, I will see to it that deposits are made with your bank in order to see that you are adequately protected? A. No.

[171] Q. Did Mr. Brede ever advise you prior to the bank's—I will characterize it as unlawful set-off and your attorney will characterize it as a proper set-off—did he ever advise you that Illinois creditors of Oakland were attempting to strip the assets of Oakland in order to be paid? In words or substance? A. Well, at what point are you asking me did he ask me?

Q. I believe that I phrased it did he ever?

Mr. Ginsburg: Could you read back my question.

(The question was read back by the Reporter.)

A. Not in those words.

Q. Well, in general did he tell you this? Did he tell you that the Illinois creditors were getting restless? A. And not in those words——

Mr. Cooke: Fine, you just answered the question.

Q. In what words, along the same line of thought did he express this? A. Essentially that he was having complications. I don't know if he used the word "trouble," but there [172] is a memo to that effect and that he would be getting together with these people and I didn't know who they were.

Q. Were one of these people St. Clair bank? A. Could have been.

Mr. Cooke: Well, do you know?

The Witness: No, I don't know.

Q. Did he specify, at anytime—— A. No.

Q. ——who the creditors were that were giving him or his company trouble? A. No, he did not.

Q. Did he delineate the creditors as being Illinois creditors as opposed to non-Illinois creditors? A. No.

Q. Did he ever advise you that by keeping Oakland's monies in the Belleville bank, the Belleville bank would have the right of set-off—— A. No.

Q. No? A. Never.

Q. Did he ever tell you that by keeping monies in the Illinois bank in Belleville that the monies would thereby be subject to attaching creditors [173] in Illinois? A. No.

Q. Did you ever advise him to take the monies out of the Illinois bank so as to make it more difficult for Illinois creditors to attach the funds? A. No, I did not.

Q. Did the subject of Illinois judgment creditors ever enter your discussions between yourself and Mr. Brede? A. No.

Q. Did you and Mr. Brede discuss whether or not Oakland's creditors in Illinois were secured or unsecured? A. No.

Q. Did you know? A. No, I did not know.

Q. Did you know the extent of the security, if any, that the St. Clair bank had in its bank loan to Oakland Foundry? A. No.

Q. And were you aware of the guarantor relationship, if any, between Mr. Brede and/or his wife individually with respect to the St. Clair loan? A. No, I did not know.

[174] Q. Did he ever advise you to what extent, if any, he or his wife were personal obligors with respect to the St. Clair loan? A. I don't recall.

Q. Were you concerned about that, sir, at all? A. No.

Q. Was there ever a discussion between you and the officers of your bank with respect to Mr. Brede's or his wife's personal—purported personal indebtedness with respect to any Illinois obligation arising out of Oakland's doing business? A. No.

Q. Did Mr. Brede ever tell you in words or in substance generally or specifically that he would prefer to have his obligations in New York paid off before Oakland's obligations being paid off in Illinois? A. No, he did not.

Q. Did he ever tell you that he preferred his Eastern creditors over his Midwestern creditors, in words or substance; and when I am speaking of "his," I am referring to Oakland. A. No.

Q. Were you aware of such an intent on the part of Mr. Brede to so prefer his New York creditors? [175] A. No, I was not aware.

Q. Were any discussions had between you and Mr. Brede and the people at the bank with respect to any purported prefer-

ence on the part of Mr. Brede regarding his New York creditors over Oakland's Illinois creditors? A. No.

Q. Were you ever aware of Mr. Brede's efforts to effect the sale or cause a merger of either the stock or assets of Oakland Foundry? A. No, I was not aware.

Q. You signed no correspondence to that effect? A. Not that I can recall, no.

Q. Did Mr. Brede ever tell you orally if he could sell Oakland, he was certainly going to do it? A. No, he did not.

Q. Did he ever intimate that in words or substance that he would like to find a buyer for Oakland Foundry? A. No, he did not.

Q. I am referring to a letter dated May 27, 1971, annexed as Exhibit P to your answers to the plaintiff's interrogatories, a letter written by Mr. Ronald Sherrill, S-h-e-r-r-i-l-l, to Mr. Arnold [176] of your bank, advising you in substance that the Oakland Foundry plant is for sale.

And I ask you, sir, if you have ever seen a copy of that letter.

Mr. Cooke: You don't recall seeing the letter?

The Witness: No.

Q. You have no knowledge then whether or not Mr. Arnold spoke with you about this letter? A. I have no knowledge of it.

Q. You have no knowledge of it. Your best recollection is that Mr. Arnold did not bring this letter to your attention? A. That's right.

Mr. Ginsburg: The letter dated May 27, 1971, to Mr. Arnold from Mr. Sherrill, is identified as Plaintiff's Exhibit Number 20, please.

(Letter dated May 27, 1971, to Mr. Arnold from Mr. Sherrill, was marked as Plaintiff's Exhibit 20 for Identification, as of this date.)

Q. The letter refers to, "The plant is for Sale." I take it you have no knowledge of any [177] conversations relating to the sale of the plant if you are distinguishing that from the sale of the business or assets? A. I have no knowledge of it.

Q. I see.

I show you what appears to be a handwritten memorandum attached to what was identified last time as Plaintiff's Exhibit 4, and I ask you if you could please identify it. A. This is a handwriting of my predecessor.

Q. Who is your predecessor? A. Mr. Robert S. Miller. He was president of the bank before I was.

Q. What was his tenure, the term of office? A. Term of office? I don't know when he was made president of the bank—until—he passed away and that would have been a year after I was made president. About seven years ago, almost eight years ago.

Q. Well, you mean going back to '66 or '67? A. Yes. That's his handwriting. I don't know what the other side of this is but——

Q. Well, I obtained that document obviously from your counsel and I am wondering, sir, if you have [178] ever seen that memo before? A. It might well be within the file. I may have glanced at it but I have not given it the attention I am giving it now.

Q. Would you read that.

Do you see a reference there to a sale of Oakland? A. No.

Q. Or purported sale? A. No.

Q. Do you see any reference there to the business of Oakland? A. No.

And it couldn't have been if it's in his handwriting. It could not have been because he passed away before——

Q. You are saying that that memo is just irrelevant and it just came out of the file and it doesn't belong there? A. Well, it was part of his file. I imagine that's why it was duplicated, but it does not relate to Oakland because it was—he had passed away before we got into the Oakland situation.

Q. Well, do you see a reference here to salability [179] of merchandise—— A. Can we find the original? Maybe the front of it will give us the whole story.

Mr. Goldman: If we gave it to you, it came from the file.

Mr. Ginsburg: Off the record.

(Discussion off the record.)

Mr. Cooke: Do you see a reference in that statement to——

Q. "Salability of merchandise in the event that the company goes out of business"? A. Yes, I see it.

Q. Do you know which company Mr. Miller is referring to? A. No, I don't.

Q. So it could be Oakland or it might not be Oakland? A. It could not be Oakland because Mr. Miller passed away prior to our getting involved in Oakland.

Q. And it's your best estimate that he is referring to another company? A. Yes, some other company.

Q. Could you turn that piece of paper you are looking at over and there's another handwritten [180] memo dated March 26th, 1970; is that correct—March 23, 1970, I am sorry. A. Yes, I see that.

Q. Is that your handwriting, sir? A. That's my handwriting.

Q. Is there a reference there to possible merger between Oakland and another company? A. It says, "Merger possibility with Oakland Foundry."

Q. Did you write that memorandum at or about the time it was purportedly written? A. It would have been dated the day I would have written it, yes.

Q. Contemporaneous memorandum, in other words? A. Yes.

Q. Is this based upon a telephone conversation that you had with someone or based upon a face-to-face discussion? A. The nature of the makeup, it would have been a telephone inquiry although I don't indicate it here.

Q. Well, can you remember the circumstances which gave rise to the writing of that memorandum? A. I can't even recall it other than it [181] must have been a telephone inquiry and just a notation that this individual called inquiring and usually we try to determine the reason for the information and I just noted that down.

Q. I see. Inquiring about a possible merger between Oakland and another company in the St. Louis area? A. Yes.

Q. Could you read that into the record because it's in your handwriting. A. I just have it dated 3/23/70, and apparently the gentleman's name was Patterson: "Bayman's National Bank, St. Louis," and it says, "Re: Merger possibility, Oakland Foundry," and then I have my "with"—"with sink manufacturer, St. Louis area."

Q. Is that all that's on the memo? A. That's all.

Q. And you have nothing to add to that memo with respect to your recollection if it is all refreshed? A. That's all.

Q. Were you aware that Oakland during 1970 and/or 1971 was advertising in the Wall Street Journal for a buyer? [182]
A. No.

Q. For the company? A. No.

Q. Mr. Brede never brought that to your attention? A. No.

Q. So, it's your testimony that at no time did you have any conversations with Mr. Brede about potential sale of Oakland Foundry? A. It never came as part of my conversation with him.

Q. Referring to Plaintiff's Exhibit 19, there is reference to the defendant being aware that Mr. Brede was not in a position to pay off the debt in mid-1970.

Do you see that on the first page? A. In the front?

Q. Right. The first line. A. Was not in a position to——

Q. It says, "As expected." Was that expectation based upon an oral conversation which you had with Mr. Brede prior to that time or just based upon the financial statements that you had received up to that time or both? [183] A. It was based on my opinion from the experience with the loan.

Q. Well, what facts was your opinion based upon other than the financial statements sent to you by Oakland since the inception of the loan and the trucking strike that you referred to? A. Yes, well, from what I could see.

Q. Well, what did you see? A. From the fact that it was a continuously loss operation, could hardly expect that he would make a substantial payment.

Q. Unless he went to someone else—— A. Some other source.

Q. Were you advised that he was attempting to obtain monies from another source in order to repay the instant loan? A. I was not aware of it, no.

Q. Now, on the back of that memorandum, there is a reference here to the "bank want(ing) out", with the brackets around the "i-n-g".

Are those the words that the bank said to Mr. Brede? A. I don't—these would have been my words and I don't believe I used exactly those words.

[184] It is an expression, let's say, within the industry. "We want out." And this is essentially——

Q. Well, the words are in quotations and I take it they are in quotations because of the vernacular as opposed to what was actually said. A. I would have implied as much.

Q. Have you stated the reason why the bank wanted out this morning and in your prior deposition, would you have stated additional reasons at or about the time you made this memorandum? A. I think I stated earlier in the sense that we expected our time loan to have been paid out at maturity, its anniversary. That did not occur, of course.

Q. But that was, you know, the first anniversary was five months before this and did it take you five months before you expressed the wanted out philosophy or had you expressed prior to June 18th, 1970? A. I am sure it was expressed before that time, yes.

Q. And what, if anything, did Mr. Brede say when you advised him in words or substance that the bank wanted out? A. Well, he must have—he had agreed to do it.

[185] Q. He had agreed to do it? A. Well, when we wanted out—said he was not able to do it. Must have expressed that point because we acted going forth to collateralize ourselves.

Q. Was Plaintiff's Exhibit 19 drafted at or about the time it was purportedly written? A. Oh, yes.

Q. And it was you who formulated this memorandum? A. Yes.

Q. And this memorandum is based upon several discussions prior to the time it was actually written as well as your own opinions of the financial situation of Oakland Foundry; is that a fair statement? A. Not several but one or two, yes.

Q. One or two, okay.

In the penultimate paragraph on the back page of that memorandum there is a reference to the, "Shell corporate structure of Oakland Foundry."

Had you ever spoken to Mr. Brede about Oakland Corporation, about a shell corporation? A. I think I am referring to Electronic Cabinets. Shell, shell corporate, it is poorly expressed. What I am referring to is Electronic Cabinets as being the shell corporation.

[186] Q. Well, Electronic Cabinets you characterize—now, you are saying that the shell corporate structure refers to Electronic Cabinets and not to Oakland; is that right? A. Yes.

Q. Even though the memo says Oakland? A. Well, "Shell corporate structure of Oakland Foundry." I am referring to the three items of collateral values we have behind us, H. W. Brede. I am referring to the Electronic Cabinets and I am referring to Oakland Foundry Co.

Q. Well, what does the "Shell corporate structure of Oakland Foundry" refer to? Does it refer to something other than Oakland Foundry? That's what I am trying to get at. A. Just Electronic Cabinets.

Q. In other words, the shell corporate structure of Electronic Cabinets was part of the collateral? A. Yes.

Q. So it was either a typo or inartfully expressed? A. Yes, that's the way I put it.

Q. Did you know the business of Electronic [187] Cabinets at or about the time of the drafting of this memo identified as Plaintiff's Exhibit 19? A. I don't know specifically the business of it. I know how it existed and how it related to Oakland Foundry.

Q. How did it? A. As the parent corporation.

Q. Was it a holding company? A. I don't know that the Electronic Cabinets was a holding company but it was a — Oakland Foundry was a subsidiary of Electronic Cabinets.

Q. Well, do you know the nature of the business of—or did you then know it of Electronic Cabinets, Inc., assuming it had any other than the holding of the stock of Oakland Foundry? A. I do not know exactly what Electronic Cabinets' operation was.

Q. But we identified this morning as Plaintiff's Exhibit 16 a balance sheet for Electronic Cabinets showing a net worth of approximately \$115,000, did we not? A. Yes.

Q. And as part of that balance sheet, there is reference to cash and accounts receivables, etcetera, [188] and you are still unable to tell me what the business, if any, of Electronic Cabinets was? A. No, specifically, I don't know.

Q. I see.

Now, you refer in the last sentence of the last paragraph of Exhibit 19 to the possibility of Mr. Brede selling out his equity? A. In the last paragraph? 19?

Q. Right. What did that relate to? A. Referring to that, it looks like a long-term workout unless he sells out, as I put it.

Q. Unless he sells the business of Oakland, is that what you are referring to? A. Yes.

Q. Now, was that the first time that the thought of selling the business of Oakland had come to your attention or had been brought to your attention? A. This is an expression I used.

Q. I see. A. Selling out is equity. This is one way out of the business.

Q. Selling his stock ownership business in Oakland Foundry? A. Selling his business.

[189] Q. During the life of the loan which the defendant had with Oakland Foundry, did the bank cause any spot credit checks to be made on Mr. Brede or any of his companies through Dun & Bradstreet, etcetera? A. During the life of the loan, I don't recall that we did.

Q. Would this have been normal procedure on your part in the event that you were concerned about the exposure to the bank as a result of the borrower losing money on a steady basis for you to cause a report to be made? A. We could, to get further information, more detail.

Q. But you have no recollection of doing it in this case? A. I don't recall that we did.

Q. Would your file reflect whether or not such a Dun & Bradstreet report had been made? A. Yes.

Q. And it's your testimony that none was made with respect to Oakland Foundry's \$125,000 loan? A. I don't recall it.

Q. You don't recall.

I notice in the documents which were sent [190] over to me yesterday relating to Mr. Brede individually, as well as Herman Brede Co., Inc., that certain Dun & Bradstreet reports were made relating to those parties H. W. Brede Co. and Herman W. Brede.

Do you have any recollection of those reports? A. If they were, they were routine credit follow-ups.

Q. I see. And to the best of your knowledge, though, there were no routine credit follow-ups with respect to Oakland in the instant loan? A. I don't recall.

Q. Well, if there were any, will that information be provided? A. Yes.

Mr. Cooke: Yes, of course—if it hasn't already.

Mr. Ginsburg: I am speaking of credit reports either by Dun & Bradstreet or another agency similar to that.

I notice that there were with respect to other loans.

I have a credit memorandum here dated January 2, 1969, and I would like to have it marked as Plaintiff's Exhibit Number 21.

[191] (A credit memo dated January 2, 1969, two pages, was marked as Plaintiff's Exhibit 21 for Identification, as of this date.)

By Mr. Ginsburg:

Q. Are these your handwritten notations on the back, sir?

Q. The other two, if you know? A. The other two would have been notations of the—in one instance, a clerk, and in another instance, a notation was made of which I put my okay to.

Q. So there was another officer who was involved with respect to the supervision of the instant loan? A. Yes, he was involved in our action of putting the paper work through.

Q. What was his name? A. That was William C. Arnold.

Q. William C. Arnold? A. Yes.

Q. Is he the vice president of the defendant? A. Yes, he is a vice president.

Q. Was he at that time? A. He was a vice president, yes. I would [192] believe he was in '69, yes.

Q. Were his responsibilities with respect to the instant loan confined to these handwritten notations on the back of Plaintiff's Exhibit Number 21 or did he have some other role in this matter? A. His—we have an original approval for the loan.

Q. Right. A. And in order for the request renewals to be processed through, it would take two of us to act to see that it was acted within the authority that was already established and this is what happened here.

Q. To your knowledge, what other information does Mr. Arnold have with respect to this loan about which you have not

previously testified? A. Hardly any, really. Other than he knows that he would—that he would have known the original basis of the approval which was the yearly clean-up and we were functioning within that limitation for renewals.

Q. When was the first time that you were advised that the plant of Oakland Foundry in Belleville, Illinois was closed, if at all? A. I really don't know if it's closed now. [193] I don't think I have really ever known that the plant was closed.

Q. Well, when I ask you whether or not you know, I am not speaking for firsthand knowledge which is based upon a physical investigation of the premises but I am speaking in terms of either hearsay knowledge or any other way that that type of information would have come to your attention.

Do you have any information on that score? A. No, I don't. I don't know of any information that I have or any information that came to my attention that the plant was closed.

Q. Did it ever come to your attention at some point that at some point in 1971 the employees of Oakland Foundry were substantially reduced and that the payroll was substantially decreased as a result of the inability on the part of Oakland to meet its current obligations? A. No, not exactly as you put it.

Q. Well, put it in the fashion which comports with the facts as you know them since I take it you are closer to it than any of us in this room.

What came to your attention which bore on the issue as directed by my last inquiry? [194] A. Yes. The fact that I knew that Mr. Brede had mentioned a streamlining and automating his whole process which would be indicative of two things: increasing capacity or reducing personnel.

To that effect, yes. But otherwise, no.

Q. Streamlining and automating? A. Yes.

Q. When did those words first come to your attention with respect to Oakland Foundry? A. I am using "streamlining" now because the automation I feel was probably in one of my memos.

Q. Which memo was that? A. I wouldn't recall but at some point.

Q. Well, how many memos do you have here? I have only seen three or four. I was wondering where the automation occurs.

If you would check your files—I don't remember seeing that word unless I missed it. A. I just feel that I have it in there. So I don't know where I—it is not likely to be in the originals. It would be in Oakland Foundry.

Mr. Ginsburg: Off the record.

(Discussion off the record.)

A. This is the original memo that I have [195] gone back to which is a continuation of this because I refer to this, refer to continuing information sheet.

Mr. Cooke: January 2, '69?

The Witness: January 2, '69, the original—in that I had a conversation with David Gordon, vice president of St. Clair, who mentions that he has known the operation since its inception and he has seen a marked improvement and increased efficiency since Mr. Brede took over.

He knows and has witnessed Mr. Brede's personal involvement in the installation of an automated assembly line production which has increased so much the efficiency of the operation.

By Mr. Ginsburg:

Q. You are referring to automation in terms of putting in machines and reducing the number of staff; is that what you are referring to? A. Just simply quoting what the man said.

Automated can be whatever he might have observed as being automated.

Q. You referred to the words, "Streamlining" before. Were you referring to pruning down the number of employees at the Oakland plant? A. To the extent that it was implied here.

[196] Q. That's in the January 2, 1969 memorandum? A. Yes.

Mr. Ginsburg: Could I have that marked as Plaintiff's Exhibit Number 22, please.

(A Dun & Bradstreet analytical report dated December 11, 1970 was marked as Plaintiff's Exhibit 22 for Identification, as of this date.)

Q. I show you what has been marked as Plaintiff's Exhibit 22, and I ask, sir, if you would please identify that. A. Dun & Bradstreet analytical report, December 11th, 1970.

Q. Of the bankrupt? A. Oakland Foundry Co., Inc.

Q. Do you know who ordered this report? A. No, I don't, other than my credit department might have done so.

Q. But it was done by the defendant as opposed to a third party, to your knowledge? A. Yes, I am sure that we must have asked for it.

Q. So, in fact, it was a credit report ordered by the defendant bank of Oakland after the inception of the loan? A. I didn't recall it.

[197] Q. Do you know the reason which precipitated the ordering of that report? A. No, I don't, other than just a normal credit follow-up.

Q. Were you aware of whether or not the St. Clair bank required that Oakland maintain a compensating balance with it during the life of the loan with the St. Clair bank? A. I was not aware of it.

Q. Not aware of it. Did you ever advise Mr. Brede either in words or in substance that it was the defendant's requirements that if Oakland had a loan at the defendant bank, that it had to maintain a compensating balance with the National Bank of Glen Head and that it would also have to keep its principal deposit account with Glen Head?

Mr. Cooke: You want to take one question at a time?

Q. All right.

The first part relating to if Oakland maintained a loan relationship with the defendant, was it a requirement that it keep a compensating balance with the defendant? A. Yes, I think we covered that in the original

[198] time we first came together, first transcript that was taken.

Q. And did you also advise Mr. Brede in words or in substance that it would have to keep its principal deposit account with the First National Bank of Glen Head? A. I don't recall whether I advised as such but since the administrative offices were in Glen Head, I expected it to be such.

Mr. Ginsburg: A memorandum dated October 17, 1969, please mark as Plaintiff's Exhibit 23.

(A memorandum dated October 17, 1969, two pages, was marked as Plaintiff's Exhibit 23 for Identification, as of this date.)

Q. There is a reference on the bottom of the first page of that memo to the defendant bank being the principal deposit account. Do you see that? A. Yes.

Q. Was Mr. Brede ever advised of that? A. I would say so—it says so right here Mr. Brede and the accountant were told that, yes.

Q. Did there come a time in or around 1970 when you told Mr. Brede or his accountant who I take it is Mr. Hirshberg—
[199] A. Yes, that is correct.

Q. —that your understanding with him was not being lived up to with respect to your bank being the one having the principal deposit account? A. I don't know that I actually discussed that they weren't living up to their compensating balance because we don't apply them as a requirement.

Now, we are speaking of the principal account here. We also have knowledge of the corporation itself and how it was functioning and its loss experience.

Q. Have you finished your answer? A. Essentially, yes.

Q. You have no recollection then of advising Mr. Hirshberg or Mr. Brede that it was your feeling that the Glen Head bank was not the principal deposit account during the year 1970, the latter part thereof? A. No, I never discussed whether I felt that we were not the principal deposit.

Q. Did you ever speak with the other people of the defendant bank with respect to whether or not during the latter part of 1970 the feeling was that the defendant bank was not the principal deposit account for Oakland? A. I never discussed that with them.

[200] Q. This would not have come up at a loan committee meeting? A. It could have but I don't recall that it did come up.

Q. When a memo was drafted by you and later initialed at the bottom in typewritten characters, do you usually read it after it's drafted, before it's put in the file? A. Usually.

I wonder if we can take a few minutes break.

Mr. Ginsburg: Fine.

(At this point, a five-minute recess was taken.)

Q. Did Mr. Brede ever bring to your attention the possibility of an acquisition by Oakland of Richwood Products? A. Yes, he did.

Q. When was that? A. I would have to guess at it, without looking at the files, in the early part of probably '71. I think it would be about that time.

Q. Do you remember the circumstances surrounding Mr. Brede's bringing that to your attention? A. Yes. He felt that was an acquisition that [201] he would like to make. It was an operation that was complementary to his.

Q. Did he call you about this? A. Well, he came in with that.

Q. When did he come in with that? A. I don't remember.

Q. You don't remember? A. No.

Q. What, if anything, did you say to him when he came in to discuss this? A. I don't recall what I said to him. I don't think I even made any recorded detail about it because I was not interested in extending further credit.

Q. So he came into the bank in the context of getting further—a further line of credit to make the deal? A. Well, yes, that was essentially what he was after.

Q. He was talking in terms of purchasing Richwood based on the sale of assets as opposed to stock for stock—— A. I don't recall making even notations.

Q. Did anything ever come of that discussion, to your knowledge? [202] A. Not beyond the inception.

Q. Have you ever heard of Sylvia Kessler? A. Yes.

Q. In what connection? A. She was in his office and I think she had an official capacity with Oakland Foundry, as I recall, under the corporate authorities that were filed.

Q. She was in the office of Glen Cove or Belleville—— A. Glen Head.

Q. Glen Head.

Do you know if she was a secretary of the bankrupt corporation? A. I believe she was. I don't recall exactly what title she had but I believe it was secretary.

Q. Did she ever discuss the loan to Oakland with you at anytime? A. At no time.

Q. Did she ever advise you of the financial condition of Oakland at anytime? A. No.

Q. What was the extent of your communication with Ms. Kessler insofar as it relates to the issues in this lawsuit? [203]

A. As it relates to the issues in this suit?

Q. That's correct. A. I have never discussed it with her.

Q. Well, insofar as those discussions pertain to your bank's \$125,000 loan to Oakland? A. She never entered into it.

Q. She never mentioned it to you? A. No.

Q. Did you have any conversations with her? A. On no occasions did I have any conversations with her in connection with this borrowing.

Q. To your knowledge, did anyone else with the defendant? A. Just Mr. Brede and his accountant would on occasion.

Q. Well, I am speaking of whether or not anyone else on behalf of the defendant spoke with Ms. Kessler with respect to the instant loan; do you know of any others? A. I know of no one.

Q. The only persons with whom you spoke regarding the instant loan were Mr. Hirshberg and Mr. Brede with respect to Oakland people? A. Right.

[204] Q. What, if anything, did you say to Mr. Hirshberg, what, if anything did he say to you, regarding that \$125,000 loan? A. Whatever conversation I had with him were a discussion of just—a verbal analyzation of his statement. That's all. Explanation of detail on his statement.

Q. Based upon a perusal of the financial statements of Oakland, you and Mr. Hirshberg would sit down and go over those statements? A. This was the occasion when he and Mr. Brede came in, yes.

Q. This was one occasion or more than one? A. I can only really recall the one occasion. It was that memo you just handed me.

Q. The memo being Plaintiff's Exhibit 23, dated October 17, 1969? A. Yes.

Q. That was the first time and the only time that you had met Mr. Hirshberg? A. No, it wasn't because he was a resident of the community.

Q. He lives in Nassau County? A. He lived in Glen Head.

[205] Q. Well, did you ever ask Mr. Hirshberg for an audited financial statement of the bankrupt, Oakland? A. No, I don't know that I asked in those words.

Q. Well, in your own words, sir, did you ask for a statement, financial statement of Oakland other than in unaudited form? A. I would have asked for an accountant's statement rather than Mr. Brede's compilation of figures.

Q. Well, the statements which we have previously identified at your last session on October 23, were you led to believe that those were statements prepared by an accountant as opposed to compilations of figures garnered as a result of Mr. Brede's efforts? A. I accepted them as they were stated as unaudited statements.

Q. From Mr. Hirshberg or from Mr. Brede? A. They would have been ordered by Mr. Brede.

Q. But who was represented to you, if anyone, as the person who actually made the balance sheet and made the P & L? A. I don't know as anyone was represented to have done so and——

Q. I see, and you were concerned with it being formulated by an accountant as opposed to Mr. [206] Brede? A. Yes.

Q. At anytime did you say to somebody, either Mr. Hirshberg, Mr. Brede, or someone else acting on behalf of Oakland that you would like to see something other than an unaudited statement, that is, a certified statement or an audited statement of the bankrupt? A. It would be—I can't recall the incident but it would be a normal question we would always put to people.

Q. You are saying that this is sort of business procedure? A. Yes.

Q. Do you remember making such a request in this particular instance? A. No.

Q. You have no present recollection? A. No.

Q. Did you ever question the Dun & Bradstreet report which I previously identified as Plaintiff's Exhibit Number 22 as being true and correct? A. No.

Q. You never delved behind—— [207] A. I never delved with that report.

Q. You never did? A. No.

Q. You received it. Did you read it? A. No.

Q. Someone else at the bank did? A. Must have called for—the credit requirements, yes.

Q. And do you have an independent recollection of the person who made such a perusal of that report contacting you to express an opinion with respect thereto? A. I don't recall it, no.

Q. You don't. Would that have been normal business procedure if someone had read a Dun & Bradstreet and had some question with respect to it about the truth and accuracy about it, to let you know that perhaps this is something you should be aware of? A. Yes, that would be so. But I don't recall in this instance.

Q. I show you a handwritten memo in undated form and I ask you, sir, if you can tell me who prepared that; is that your handwriting? A. No.

Mr. Ginsburg: Could we have it identified [208] as Plaintiff's Exhibit 24.

(Copy of an undated memo was marked as Plaintiff's Exhibit 24 for identification, as of this date.)

Q. Can you tell me whose handwriting that is? A. I am trying to identify it but I don't know that I can say whose it is.

It looks more like notations for an analysis purpose than they——

Q. Do you see the reference there to a request for an audited statement of Oakland? A. Yes.

Q. Do you know anything about that request? A. No, I don't.

Mr. Ginsburg: I believe this gentleman who is sitting next to Mr. Cooke, whose name is Mr. Stein, has the original memorandum?

Mr. Stein: Yes.

Q. Can you determine from that original memorandum, sir, whose handwriting it is? A. It would be somebody in the credit department or someone handling credits at the time that could have taken that. More detail for one of our credit people.

[209] Q. Do you know what the numbers in the upper left-hand corner represent? A. I think perhaps they refer to these two figures up at the top, 318 and 46 could refer to thirty-two per cent and forty-six per cent.

Q. There is a reference on the fourth line of that memo as to a request for reconciling the net worth, that it doesn't make any sense.

Do you remember having any conversations with Mr. Brede about the net worth of Oakland not making any sense? A. No.

Q. Anyone ever bring that to your attention in the credit department of the bank? A. I don't recall.

Q. Well, who was in the credit department at that time who would have had the responsibility of making such an informal report, if anyone, if you know? A. I just couldn't tie this down to a handwriting at all.

Q. Well, who was in the credit department at that time? Do you know the names of the people?

Mr. Cooke: At what time?

[210] Mr. Ginsburg: Well, during 1970 and 1971.

Q. Do you know? A. No, I don't. We have two young ladies that do a lot of our credit clearing and I don't think the wording here is of the nature to be theirs. This is what stops me.

Q. I see. Well, apparently the person who prepared that memorandum had at his disposal two pieces of paper. The year ended December 31, 1970 income statement of Oakland, represented as Plaintiff's 15 and Plaintiff's 22, because he is comparing the sales as represented on the Dun & Bradstreet as \$1.4 million, as to the sales, as represented on the income statement approximately \$546,000; is he not? A. That's about what he says, yes.

Q. So somebody had that in their possession subsequent to December 11, 1970, correct? A. Yes.

Q. And I would assume prior to July 13, 1971 or there would have been no purpose in the memorandum.

Do you know who was there during that six- or seven-month period who might have drafted that memorandum identified as Plaintiff's 24? [211] A. I don't know who would have prepared it.

Q. There is a reference with respect to a desire to see an audited statement. Do you remember anyone expressing such a desire to you at the bank? A. No.

Q. Do you remember any concern at the loan committee meetings between December of 1970 and June of 1971 with respect to a desire on the part of anyone at the bank to see an audited statement of Oakland? A. Well, that could start with me. I would love to see an audited statement.

Q. I am asking your best recollection as to your desire to seeing this done, if you can remember any such conversation with took place. A. That's what I'm trying to get, what took place.

Q. You have no recollection? A. No.

Q. Do you remember someone telling you that someone fibbed, as stated in the middle of that undated memorandum, with respect to their analysis of the D & B? A. No.

Q. No one told you that a purported misrepresentation had been made in connection with either the profit and loss statement for the year ended December 31, 1970 or the Dun & Bradstreet report of December 11, 1970 with respect to the sales volume of the bankrupt? A. No.

Q. Well, what is the normal procedure at your bank with respect to the credit department preparing an analysis? Do they just prepare analyses and throw it in the files or speak to their supervisors? A. It usually comes back to us.

Q. Who is "us"? A. Whoever is near to the loan—to me.

Q. If the person who drafted this didn't fall asleep, correct?
A. I don't know why it didn't reach me. Put it that way.

Q. But it's your testimony that it didn't? A. That's right. I don't remember it reaching me.

Q. Did anyone advise you that they were contemplating requesting the SBA to subordinate their \$250,000 loan to Oakland's indebtedness to the bank, as set forth on the last sentence of that memo? A. I will have to read the whole paragraph [212-A] because that sentence doesn't seem——

Q. Please do. A. I don't know what he was referring to: "Machinery is of value to us only if SBA will agree to subordinate." I don't know what the person was referring to.

Q. So this entire subject matter is sort of debuting itself to you today as opposed to something you had seen back in 1970 or 1971? A. That's right.

Mr. Ginsburg: Let the record reflect that the original of Plaintiff's Exhibit 24 is in the room today and in the possession of the defendant and I have marked a copy of it as 24.

Q. Were you aware of the fact that Mr. Brede in 1971 was traveling between his home in Upper Brookville and Belleville, Illinois to have consultations with his Illinois creditors? A. No, I was not.

Q. To your knowledge, was anyone else at the

(Continued on the following page.)

[213] defendant aware of those meetings between Mr. Brede and his Illinois creditors? A. I know of no one else.

Q. To your knowledge, did the SBA ever agree to subordinate its debt with respect to the value of the machinery as referred to in Plaintiff's Exhibit 24? A. To my knowledge, never.

Q. To your knowledge, was any effort made on the bank's behalf to approach the SBA to do so? A. No approach was made by the bank.

Q. Would you have been the person who would have been charged with that responsibility? A. Yes.

Q. Do you have any knowledge of any subsequent Dun & Bradstreet reports after the December 11, 1970 one, which we identified today as Plaintiff's Exhibit 22? A. No, I don't.

Q. Will you endeavor to find out who directed Plaintiff's Exhibit Number 24 and fill in the name of that person in the deposition transcript? A. Yes, I will.

Mr. Cooke: If it is ascertainable.

Mr. Ginsburg: Obviously. I want to find out who drafted it and when.

[214] A.
.....
.....

Q. You have no knowledge as to whether or not any efforts were taken on behalf of the bank to cause the net worth of Oakland to be reconciled in any respect? A. No.

Q. And you have no knowledge with respect to the bank taking any steps to cause an audited statement of the financial condition of the bankrupt to be prepared? A. No, no direct request.

Q. Indirect? A. Well, as I had said before.

Q. Other than the statement of Mr. Hirshberg on December 17, 1969. A. Yes.

Q. And no action was taken with respect to that request is your testimony? A. That's right.

Q. With respect to the \$125,000 loan in or about June of 1971, had the interest payments been paid promptly up to that time? A. Yes.

Q. They had been. There was no difficulty with [215] respect to collection? A. No.

Q. I show you a letter dated June 2 of 1971 from Mr. Arnold to Mr. Sherrill and I would like it identified as Plaintiff's Ex-

hibit Number 25, and I ask you, sir, if you could please identify it. A. It is a letter of Mr. William C. Arnold, vice president, to——

Q. Mr. Sherrill? A. To a Mr. Ronald G. Sherrill, commercial loan officer, Tower Grove Bank and Trust, Grand Boulevard at Hartford Martin, St. Louis, Missouri.

Mr. Ginsburg: You want to identify that as Plaintiff's Exhibit Number 25.

(Letter dated June 2, 1971 from Mr. Arnold to Mr. Ronald G. Sherrill was marked as Plaintiff's Exhibit 25 for Identification, as of this date.)

Q. Now, can you tell me sir, based upon—first of all, have you seen that letter prior to day? A. Yes.

Q. In what connection? A. As I was reviewing the file.

Q. Can you tell me, sir, based upon your reading of that letter, how Mr. Arnold characterized [216] or quantified the balance on hand of the defendant bank on or about the date of that letter? A. The balance on hand, meaning his loan account?

Q. No, I am speaking in terms of the bank balance. A. Bank loan——

Q. I am speaking—there are two different things in that letter.

Number one, there is a reference to the loan, and, two, there is reference to an account; is there not? A. First a reference to the account and then a reference to the loan.

Q. Right. There is a reference to the account and the account and it quantifies what that account consists of, does it not? A. Yes.

Q. It speaks in terms of a four-figured account on deposit? A. No, it doesn't—"Maintains an account with us."

Q. Doesn't it refer to a number? A. Yes.

Q. What is that number? [217] A. In the low five-figure range.

Q. Low five-figure range, meaning five figures starting with \$10,000; is that correct? A. Yes.

Q. And high range of five figures would be 900—I am sorry, \$99,000, correct? That would be the high range of the five figures? A. Yes.

Q. Do you know what the balance of Oakland's account was on June 2, 1971 on the date when Mr. Arnold replied to Mr. Sherill? A. No, I don't, not on that day.

Q. Well, even as of the end of May 1971. A. I think we have it in the record of the previous——

Q. Well, I suppose in looking at the statement you can see that at the end of May there was \$96,706 on deposit. That would be a high five-figure, would it not? A. That on that particular day, yes.

Q. That's right. Well, did the figure go down at all between May 28, 1971 and any point in June thereafter of 1971?

It appears as though it went into the low [218] six-figured numbers in early June of 1971. A. Yes, but Mr. Arnold speaks of the average and we have analysis on accounts and he would look at the broad average of the account, usually over a twelve-month period.

Q. And that is what he is referring to there, an average as opposed to a—a specific day, I guess. A. Right.

Q. It says here, "Balance is currently averaging in the low five-figure range".

Mr. Ginsburg: Let the record reflect a conversation between counsel and his client.

Q. I don't understand what he means by "currently averaging in the low five-figured range," other than in the last month or two.

Do you understand what he means by currently averaging?
A. I don't know. How he expressed—I can draw conclusions as to what he meant which may be inaccurate to the facts. I can state that but——

Mr. Cooke: His answer is he doesn't know.

Mr. Ginsburg: Okay.

Q. Did you have a telephone conversation with Mr. Brede on or about June 29 of 1971? [219] A. I guess that was the day, yes. I guess that was the day.

Q. Counsel says yes or do you say yes? Did you have that conversation on June 29, 1971? A. Yes.

Q. Where did this conversation take place? A. In my office, over the telephone.

Q. When had you last—well, with whom did it take place?
A. Between me and Mr. Brede.

Q. Was it a conference call over the speaker? A. No, no, just an ordinary telephone call.

Q. Was anybody else present? A. No.

Q. How long did the conversation take place? A. A minute or two.

Q. You were in your office at the time? A. Yes.

Q. He phoned you? A. Yes.

Q. Did he tell you where he was phoning from? A. Yes.

Q. Where? A. From Illinois.

[220] Q. Do you remember what time of the day this telephone conversation took place? A. About midday.

Q. Your conversation was about a one-minute phone call?
A. About.

Q. When was the last time you had heard from Mr. Brede?

Mr. Cooke: Could you speak as of a certain date? You are speaking as of today?

Mr. Ginsburg: All right.

Q. We are talking as of the June 29, 1971 phone call. When was the last time prior to that phone call that you had heard from Mr. Brede? A. The only time I can recall was the instance when he came in with the Redwood statement. That was the last——

Q. A Redwood statement? A. Well, that manufacturing corporation that he was thinking of acquiring.

Q. Richwood Products? A. Richwood. If that's what it was.

Q. So, you didn't hear from him after that time until the 29th of June, 1971? [221] A. No, never talked to him.

Q. And you are unable to delineate at what point in time he first discussed the proposed Richwood Products acquisition by Oakland? A. No.

Q. What did you discuss in the June 29th telephone conversation? A. I didn't discuss too much with him. I just listened mostly.

Q. What, if anything, did he say, and what, if anything, did you say? A. In essence, he said he was having complications with people he was doing business with and that he would be getting together with them.

Q. "He would be getting together with them"? A. Yes.

Q. This was in futuro, something that he had not already done? A. Yes.

Q. Did he describe to you what he meant by "getting together with them"? A. Not in detail, that I can recall.

Q. Well, what in general can you remember that he discussed? [222] A. I am replying that they were giving him a hard time, whatever arrangements that he had with them, I was not aware.

Q. These were creditors of Oakland that—— A. He didn't call them creditors. Just people he was doing business with.

Q. Did he call them lenders? A. No.

Q. Did he express to you that he was associated with them with respect to a debtor-creditor relationship? A. No, he didn't say that.

Q. He didn't say that. Did he indicate to you that these persons owed Oakland money and his relationship with them was as an account-creditor? A. No.

Q. Did you make a memorandum of your discussion with him? A. Yes.

Q. Do you have that with you today, sir? A. Yes. It should be in the file.

Mr. Cooke: Off the record.

(Discussion off the record.)

Mr. Ginsburg: Can we identify this as [223] Plaintiff's Exhibit Number 26.

(A two-page handwritten memo dated June 29, 1971 was marked as Plaintiff's Exhibit 26 for identification, as of this date.)

Q. Is that the memo you referred to, sir? A. Yes.

Q. Would you tell us how long that conversation took place? A. I indicated just a very brief period, a minute or two.

Q. Is there a reference there to about Noon to 12:30? A. Yes.

Q. Does that relate to the duration of this conversation?

A. Oh, no. That's about the time I received it.

Q. And the telephone number in the upper lefthand corner relates to whose telephone number? A. That would be where he was calling from.

Q. Could you read into the record what your handwriting states? A. "Sorry he had to tell me by telephone but things were not good out there. His gathering all his forces and meeting with people he's doing business [224] with and owes money to. Has been out there almost permanently for the past month or so trying determine just where he stood. He has moved in no direction at all. Has to take a hard look at things and finally come to the decision to meet with all people involved. Is letting you know by phone," meaning me.

Q. What's at the bottom of that memo? A. Then the following is my answer, "Placed stop on account. Talked with J.L.M., attorney-director"—that's Joseph L. Martin, attorney-director who happened to come into the bank—"relative to the right of offset. Agreed we should act and take funds."

Q. Meaning the balance on the account? A. Balance on the account.

Q. Plaintiff's Exhibit 26 reflects the financial problems which Mr. Brede was having at or about the time that the memo was purportedly written, does it not? A. Yes.

Q. Was that the first time, June 29th, 1971, that Mr. Brede had advised you that he was meeting with people that he was doing business with and owed money to? A. Yes. That's the first time I was aware of it.

[225] Q. You were not advised of this in March and April of 1971 when—March, April, May, and June, when approximately \$100,000 was deposited in your bank? A. No.

Q. And his phone call to you at the end of June 1971, that came as a surprise? A. Yes, I would say that.

Q. Did you advise him what, if anything you were going to do in connection with the information that he conveyed to you? A. No.

Q. You did not? A. No.

Q. Well, did you remain silent after he advised you of his problems with the people out in Illinois? A. No, I didn't remain silent.

Q. What did you say? A. But I don't recall what I said other than probably regrets that things weren't going as he had hoped.

Q. Did you say anything else to him? A. No.

[226] Q. Did he say anything else to you other than what is set forth in this memorandum? A. That's about the extent of the conversation we had.

Q. Did you know prior to the receipt of his phone call that he had been out in Illinois permanently for the last month, May or June of 1971? A. No, I did not.

Q. Did you know at that time that the number of employees at Oakland had been substantially reduced and, in fact, there was a skeletal staff? A. No, I did not know that.

Q. You did not know that prior to the phone call? A. No.

Q. Did you know that as a result of the phone call? A. No.

Q. When did that first come to your attention? A. It never did.

Q. Did you know that the business of Oakland had been discontinued prior to the phone call? A. No, I did not know that.

Q. Did you know that Oakland had ceased its [227] manufacture of goods prior to the phone call of June 29, 1971? A. I did not know that.

Q. What, if anything, did you do with respect to what Mr. Brede advised you during the phone call, after the phone call was completed? A. I spoke with Mr. Martin, as I had already mentioned——

Q. Mr. Martin is a director of the bank? A. And an attorney.

Q. Well, is he counsel for the bank? A. No, at the time, no.

Q. He was not counsel at the time.

What did you say to him? A. Just related essentially what is in the memo.

Q. And what did he say to you? A. Well, I had indicated that I was—I felt that I should act to offset his loan and he agreed with me in principal.

Q. And what, if anything, did he say, and what, if anything, did you say with respect to the purported rights on the bank to offset the funds on Oakland's account? [228] A. Essentially what I just told you, that I was thinking of doing that very thing.

Q. At that time, were you aware of the amount of funds on deposit by Oakland? A. Only at that instant, but I can't remember whether I spoke to Mr. Martin first or after.

Q. Determining how much was in the account? A. Right.

Q. Well, what is your recollection, not in terms of the time sequence but in terms of what you determined upon checking the Oakland account regarding the amount of funds on deposit? What procedure did you take? A. I immediately acted to—I just want to give it to you in the procedure you want me to.

Q. Right. A. I acted to take the funds as a right of offset.

Q. Well, did you contact the bookkeeping room to find out what was on deposit? A. Yes, I would have—I did do that.

Q. You did do that? A. Yes.

Q. And did you do that personally? [229] A. Yes.

Q. And you were advised what, sir, if anything? A. Of the balance of the account at the time.

Q. Did you then give any instruction? A. No.

Q. What, if anything, did you do with respect to your desire to set off the funds then? A. I then acted to withdraw—block the account.

Q. Did you stop the payment of any Glen Head checks written by Oakland? A. Blocking account would have prevented a check being paid, yes.

Q. Were you aware of the types of obligations which the Glen Head account was used for? A. No.

Q. That was a checking account, was it not? A. It was a general account, yes.

Q. Were you aware of the types of obligations written by or drawn by Oakland from its Illinois checking account? A. No.

Q. Were you aware that the deposits which Oakland made during the spring of 1971 within about [230] four or five months prior to the middle of 1971 were, in fact, withdrawals from the St. Clair bank? A. I have no knowledge of that.

Q. Mr. Brede never advised you of that? A. No.

Q. You never determined that of your own nature? A. No.

Q. Your own investigation? A. No.

Q. And that was never brought to your attention in any way or to the attention of anyone acting on behalf of the defendant? A. No.

Increasing balances came to my attention but that was it.

Q. Was—what's his name, Martin? A. Mr. Martin.

Q. —advised of the build-up in the account during the spring of 1971 with respect to giving him the full information pertaining to whether or not he should set off? A. No.

Q. Did he state anything else? [231] A. No, he did not.

Q. Did you consult with in-house counsel before setting off the funds? A. I tried to.

Q. You were unsuccessful in that regard? A. Yes.

Q. As a result of that person not being at the bank at that day? A. He was not at his office.

Q. What, if anything, did you then do with respect to obtaining any advice prior to setting off the funds? A. I acted.

Q. You acted. Did you consult—— A. I blocked the account.

Q. Did you consult with outside counsel? A. When you say in-house and outside counsel, he is one and the same as far as I am concerned. He does not have offices in the building——

Q. I am talking of in-house as a bank employee as opposed to a general counsel—— A. Oh, no, we have no such person.

Q. And you have no in-house counsel? A. That's right.

[232] Q. You do have outside counsel? A. Yes.

Q. And you didn't consult with outside counsel with respect to this particular set-off? A. Not at the time that I did it because he was not available.

Q. You did at a later time? A. Yes.

Q. Who on behalf of outside counsel—whom on outside counsel did you speak with? A. The counsel himself.

Q. What was his name? A. It was Mr. Victor McCuig.

Q. Of which firm? A. Of the firm of Payne, Wood & Littlejohn.

Q. And who was present at that conversation? A. When I called his office?

Q. Who was on the phone? A. At the first call when I did not get him, his office advised me that he was not there and I made a record of it.

Q. But did you finally reach him? A. The following day.

Q. And were you the only two parties on the [233] telephone?
A. Yes.

Q. And at that time was he retained to represent you? A. He was counsel, as counsel would be, for bank representation.

Q. Did you intend that conversation to be confidential? A. Yes, yes, it would be.

Mr. Ginsburg: Would counsel object if I ask about the substance of that conversation?

Mr. Cooke: Yes.

Q. Now, as a result of your conversation with Mr. McCuig what, if anything, did you do? A. I did nothing.

Q. Pardon me? A. As a result?

Q. Yes. A. I did nothing.

Q. Because you had already instructed the appropriate persons to block the account? A. Right.

Q. As a result of your conversation with Mr. Brede on June 29, 1971, did you send a communication [234] to him? A. Yes, I did.

Q. And is that communication Exhibit C to your answers to interrogatories? A. I guess it is. I don't know—yes.

Mr. Ginsburg: I would like to identify a letter dated June 29, 1971, from Mr. Famighetti to Mr. Brede as Plaintiff's Exhibit 27.

(A letter dated June 29, 1971 from Mr. Famighetti to Mr. Brede was marked as Plaintiff's Exhibit 27 for Identification, as of this date.)

Q. Did you send Exhibit Number 27? A. Yes.

Q. Was this in confirmation of your oral advice to Mr. Brede or did you not advise him over the phone that this is what you were going to do? A. No, I did not advise him. I just did it.

Q. You just did it.

At this time, Mr. Brede was still a personal obligor with respect to the \$125,000 loan, was he not? A. As a guarantor.

Q. That's right. And I show you a letter dated July 1, 1971 from you to Mr. Brede and I ask you that this please be identified as Plaintiff's [235] Exhibit Number 28.

(A July 1, 1971 letter from Mr. Famighetti to Mr. Brede was marked as Plaintiff's Exhibit 28 for Identification, as of this date.)

Q. Did you write that letter, sir? A. Yes.

Q. At that time, the monies had been set off? A. Yes.

Q. And those monies had been set off as a result of the advice which you gave the people at your bank on the 29th? A. Yes. A blocked account, right.

Q. I take it though that in Plaintiff's Exhibit Number 27 you are advising that the demand note is being called. At that time, had the monies actually been set off or just the account blocked? A. I requested to block the account. Whether I actually put the transaction through that day, I cannot recall.

Q. There is an indication here that there was a payment of \$108,783.91 on June 30, 1971. That is on your liability ledger.

A. That's right.

Q. I take it that that is the date you set off [236] the funds?

A. That is the date I took.

Q. That is right. So you took the funds the day after the demand and the day before the advice that you took? A. Yes.

Q. Did Mr. Brede contact you? A. No.

Q. Upon receipt of either letter—— A. No.

Q. ——Plaintiff's 27 and 28.

When did you next hear from Mr. Brede? A. I think—he came into the bank and—to pay off the balance of his demand loan. July 12th or 13th, in that area.

Q. He just came in from the street and came in to pay you off approximately 14 or 15 thousand dollars? A. Yes.

Q. Did he tell you where he got the monies from? A. No.

Q. Had you been trying to contact him in order to obtain the deficiency between the amount [237] owed and the amount taken? A. No.

Q. So as of the first two weeks or so or a little bit less than that the bank was still owed approximately \$15,000? A. Yes.

Q. And it had taken no action to seek repayment of that money? A. No.

Q. No, it did not? A. No, we did not take action.

Q. Did you inquire of Mr. Brede where he obtained the \$15,000 from? A. When he asked me what he owed, I gave him the amount which included interest up to date and he drew a check against his personal account as I recall with us.

Q. Do you know if he still has that personal account at the bank? A. I know now that it is closed.

Q. Was it closed shortly thereafter? A. I don't recall. I made no note of that.

Q. Upon payment of the entire indebtedness on or about July 13, 1971, did you release the obligation [238] under the second mortgage on his house as satisfied? A. Yes.

Q. And return it to him? A. Yes.

Q. Did you also return the original promissory note of \$125,000? A. Yes, we would have.

Q. Did you also return the stock of Electronic Cabinets, Inc. and H. W. Brede Co., Inc.? A. Yes.

Q. So therefore, you returned all the collateral and extinguished all the outstanding obligations that were in the nature of your contingent liabilities which Mr. Brede owed to the bank? A. Yes.

Q. Did you have any conversations with Mr. Brede on July 13th relating to the set-off during the latter part of June 1971? A. Yes, I did have a conversation. It was a very limited one.

I just recall starting my conversation almost apologetically. I was sorry that we had to take this action.

Q. What, if anything, did he say? [239] A. Hardly anything. He sort of shrugged his shoulders and seemed understandably agitated.

Q. Did he ever say anything to you in words or in substance that he had made enough deposits with your bank in order to cover most of the indebtedness? A. No.

Q. Did he ever discuss the right of the bank to make the purported set-off? A. He didn't discuss it.

Q. He did not question the conduct of the bank in this regard? A. No.

Q. Did he question his individual obligation to pay the difference to the bank? A. No.

Q. Do you have any other memos or letters relating to the set-off other than ones which I have identified today? A. I don't recall any others, no.

Q. Did you clear the decision with the loan committee or anyone else at the bank to set off the funds? A. No.

Q. Is this general procedure on your part. [240] to make this type of decision? A. Yes.

Q. Have you done so in other cases? A. Yes.

Q. In or about July of 1971, did Mr. Brede ever express to you that he had deposited the monies with the Glen Head bank of the preceding three, or four-month period in words to avoid his Illinois creditors? A. No.

Q. So there presently is no indebtedness owed with respect to the instant loan? A. No indebtedness.

Mr. Ginsburg: Subject to the documentation that I have requested, I have no further questions at this time.

Mr. Cooke: Thank you.

(Time noted: 4:20 P. M.)

Anthony D. Famighetti

Subscribed and sworn to before me this day of, 1975.

Notary Public

[241]

CERTIFICATE

State of New York }
County of New York } ss.

I, DARLENE CASTELLANA, a Shorthand Reporter and Notary Public of the State of New York, do hereby certify:

That ANTHONY D. FAMIGHETTI, the witness whose continued deposition is hereinbefore set forth (Pages 97 to 240) was previously duly sworn, and that such continued deposition is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 20th day of February, 1975.

/s/ Darlene Castellana

[242] January 28, 1975

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Witness:

Anthony D. Famighetti

Exhibits

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| 16 | Balance sheet dated March 31, 1970 for Electronic Cabinets, Inc. | 105 |
| 17 | Balance sheet dated December 31, 1969, H. W. Brede Co., Inc. | 127 |
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| 20 | Letter dated May 27, 1971 to Mr. Arnold from Mr. Sherrill | 176 |
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DEFENDANT'S EXHIBIT C TO DOCUMENT 33

October 12, 1971

[1] In the United States District Court for the
Eastern District of Illinois

In the Matter of

Oakland Foundry Company of Belle-
ville, Illinois, Inc. } BK 71-464

Bankruptcy Proceeding of petitioners, before the Honorable
James Trabue, Referee, held at the Post Office Building, in the

City of East St. Louis, State of Illinois, on the 12th day of October, 1971.

Appearances:

Lawrence Sanders, Esq., for Bankrupt

Cohn, Korein, Kunin & Brennan, by Joel A. Kunin, Esq.,
Receiver

Jerome F. Lopinot for Transport Clearings

C. E. Heiligenstein—First National Bank

Pope & Driemeyer by Joseph R. Lowery for Peerless
Enamel Products Company

Reported by: Jennie R. Connolly

[2] The Referee: Mr. Kunin, you are representing the receiver; do you have a report on his behalf?

Mr. Kunin: Yes, Your Honor, we would like to report that the receiver took possession of all real and personal property of the bankrupt with the exception of two bank accounts, one at the Glenhead Bank and the other at the Trade State Bank and Trust Company in New York.

The receiver has been able to collect approximately \$3200 on the outstanding accounts receivable that were pending at the time of bankruptcy. In addition there are two large major portions of the large accounts receivable that have been outstanding. We have been able to ascertain that one of the receivables from Cornell International, Inc., approximately \$33,000, that that debtor has filed a chapter 11 in the United States District Court Bankruptcy in New Jersey.

We received a letter from the attorney representing the creditors committee asking us to give him a power of attorney to work with the creditors committee on the acceptance.

We haven't had an opportunity to review the plan but I think I will ask the Court for approval to allow us to participate in the chapter 11 proceeding out in New Jersey.

[3] The other claim is a special claim with P. McMullen & Son, also for approximately—I think that is about \$31,000 and they sent us a letter back justifying—at least attempting to justify something to the effect that they don't owe anything and I seriously question their computations.

Many of the other receivables are contested. Other than that the premises have been, like I say, under the auspices of the receiver. A guard has been retained by the bank to protect the interest in order to keep insurance on the building. All inventory, as far as we know, is still intact as of the date of the filing of the petition.

The Referee: Are there any creditors who haven't filed their claim or unsecured creditors at this time?

Mr. Lowery: Mr. Referee, I represent Peerless Enamel Company. We have not filed a claim.

The Referee: I think the next thing in order would be to appoint the trustee. Any nominations for the trustee?

Mr. Kunin: Your Honor, I have filed proof of claim and entry of appearance, I believe, on approximately eighteen to twenty unsecured creditors that are representing well over a hundred thousand dollars in accounts receivable and we would like to move that the receiver [4] be named trustee, Don Katz—that he be named as trustee.

The Referee: Any of the other unsecured creditors who have their claims filed have any nominations?

(There was no response.)

The Referee: Don Katz will be named as trustee by election of the voters.

Is there anything else that should come before the Court?

(There was no response.)

The Referee: Mr. Kunin, who do you want to call as a witness?

Mr. Kunin: Mr. Brede.

HERMAN W. BREDE,

having first been duly sworn, testified as follows:

Questions by Mr. Kunin:

Q. Will you please state your name? A. Herman W. Brede.

Q. What is your address? A. 7 Donna Drive, Upper Brookville, New York.

Q. Are you an officer of the bankrupt's corporation? A. Yes.

[5] Q. What position was that? A. President.

Q. How long were you president? A. Since 1967—approximately April in 1967.

Q. Did you hold any other positions with the company other than the president? A. Chief executive officer—president, chief executive officer.

Q. Were you a director? A. Yes, I was.

Q. Who were the other directors of the corporation? A. Dave Gordon and a chap from the bank—Legner; I don't recall his first name, now, any more—Bill Legner, I guess.

Q. Who is Dave Gordon? A. Dave Gordon, he was associated with the bank. He is now, I believe, in the real estate business in Belleville.

Q. What connection is Electronic Cabinets—— A. Incorporated?

Q. Right, what is the corporate connection? A. This is another corporation that I owned.

Q. Who are the officers of that corporation? A. Myself and my wife, I believe.

[6] Q. Who were the directors? A. Myself, my wife and I don't recall who the third one was, offhand.

Q. Was there any corporate linking between Electronic Cabinets, Inc. and Oakland Foundry? A. Yes, Electronic Cabinets, Inc. owned Oakland Foundry.

Q. Owned the stock? A. Yes, under the escrow agreement with the bank.

Q. What happened to the stock? I understand it reverted back to the bank? A. Yes, I believe it has reverted back to the original stockholders now.

Q. In 1967 you bought the company from—— A. Electronic Cabinet bought the company from the Ehret family, right.

Q. Was the business profitable in 1967? A. No, the business had lost money for five years previous to my buying it in 1967.

Q. You have a financial statement to the Glenhead—what is that, the—— A. Glenhead First National Bank.

Q. Did you arrange to have any loans with them? A. Not at that time, no. Wait; 1969?

Q. Right. [7] A. Yes, that was when I borrowed money, I guess, from the First National Glenhead.

Q. How much did you borrow from them? A. 125,000.

Q. What was the security for that? A. The stock of Brede Company, the stock of Electronic Cabinets and later on a second mortgage on my home.

Q. Were you always paid up to date on the interest on that loan up to the time you filed bankruptcy? A. Yes, yes, I believe so.

Q. When did you start attempting to sell the business? A. I guess about—I believe I made two attempts to sell it, I be-

lieve. I made one attempt in 1969 and I believe I made the other attempt shortly after—I guess January or February of '70—December of '70, somewhere in there.

Q. You also attempted to sell it in 1971? Did you not? A. I meant to say '71. Did I say '70? I am sorry. Yes, January, February, right in there of '71.

Q. Who did you use in an attempt—what media did you use in attempt to find a purchaser? A. We advertised in the Wall Street Journal several [8] times and then I spoke to some of the local industries in Belleville. I was doing many things at that time to try and save the business. Selling it was one of them—trying to sell off product lines, et cetera, et cetera.

Q. Did you use any of your banking connections to ascertain if they could find a purchaser for you? A. I don't believe so. Possibly the First National here in Belleville—I got together with him one day—with Mr. Hommel at——

Q. What about the First National Bank at Glenhead? A. No, no attempt was made there.

Q. They were aware that you were trying to sell the business, though, weren't they? A. I wouldn't know whether they were or not.

Q. You used the First National Bank of Glenhead as a banking account. Why did you use that bank rather than one of the local banks? A. We used local banks, too. We used the St. Clair National which later became First National of Belleville. We used them and we used Glenhead because we had accounts in both places.

Q. Starting at about March of this year, you didn't pay any of your accounts receivable? Did you? A. That is about right, yes.

[9] Q. You made all your deposits into the St. Clair National Bank? Is that correct? A. We were making deposits right along in both banks. About that time I started putting more

money into the Glenhead bank because several of the creditors were trying to attach the funds in St. Clair.

Q. But, you didn't use the bank account up in Glenhead in the normal course of your business, though? Did you? A. Oh, yes, yes. As a matter of fact, on the first two years I think it was used more than St. Clair.

Q. I mean within the last six to nine months prior to bankruptcy you weren't paying your accounts receivable out of that? A. In the last six or nine months probably more of the accounts receivable were paid out of St. Clair. I don't really recall, because we used to use both banks.

Q. You also had an account at the Trade Bank and Trust Company of New York? A. Right.

Q. What was the purpose of this bank? A. Just a transfer account, really. The fact that they had the mortgage on the machinery. I banked at the Trade Bank just to facilitate matters. We had a [10] small account that we used to put two thousand a month or something in.

Q. During the months prior to bankruptcy had you been in contact with the First National Bank of Glenhead concerning your sale of the building? A. No. About the only contact I had was right towards the end in June or July. I got all the people together here in Belleville and told them that we were in financial trouble and I called the bank up in New York and told them that we were in financial trouble.

Q. At that time what did you owe the bank in New York? A. One hundred twenty-five. That was a demand note.

Q. Who did you speak to in New York? A. The man at the bank is Mr. Fargetti.

Q. How do you spell that? A. F-a-r-g-f-e-t-t-i, I believe.

Q. What is his position at the bank? A. He is president.

Q. Did you call him from Belleville? A. Yes, I called him and I told him that I was meeting with the other people in Belleville and briefly outlined what the problem was.

Q. It was immediately after that that your account [11] was—— A. He confiscated the money. He sent a note in confiscating the money that was on deposit in that bank.

Q. You had terminated all operations at that time? A. Not at that time, all operations. We operated on for, seems to me it was a few weeks after that. I am a little bit hazy on these dates.

Q. We filed an involuntary petition on about the 15th of July and you had already been closed down, I think, for four to six weeks before that, had you not? A. No, if I recall rightly, I think we closed down just before July 4th, but I still kept one girl employed, I think, right up to the time of the bankruptcy.

Q. But, what is your basic business? A. Basically space heaters and compact kitchens and cabinets as well and type of subcontract work and so forth.

Q. You do a lot of private brand work? A. No, we did no private brand work.

Q. Was there any correspondence with the First National Bank of Glenhead making demand upon the note or did they just exercise their—— A. I believe they wrote a letter and then followed it up by confiscating the money. I believe there was a letter demanding payment and then a further letter after [12] that confiscating the money. They should be in the file over there.

Q. I don't know if I asked you, what is Mr. Fargfetti's—he is president? A. Yes, he is president of First National of Glenhead.

Q. Do you remember who was present at the time of this telephone conversation? A. Who was present?

Q. Yes, at the time you made the phone call. A. To tell him that we were in trouble, you mean?

Q. Yes. A. Probably no one. I was probably in my own office out there at the factory.

Q. The reason I asked you, you said you were having a meeting and then you called the First National Bank of Glenhead. Were you advising them that you were insolvent at the time, that you just couldn't pay back the loan? A. No, I advised them basically that I was going to talk to the other creditors and tell them that I was in trouble and that I was still trying to work my way out of it.

Q. What else did you tell them, if you remember? I know we are talking about five, six months. [13] A. That is basically all, just simply told them that we were in trouble and that I was calling a meeting of the other people, the St. Clair Bank and the SBA.

Q. Did you advise them you would have to close down if you couldn't work out anything with SBA? A. No, at that time I believe I was still negotiating here with Mr. Hommel for one and so forth. I still had hopes of pulling it out.

Q. Who is Mr. T. G. Groesch? A. He was one of the employees there at the plant.

Q. Is he a salesman? A. He was kind of plant manager.

Q. Would there have been any reason you would have written him a rather large check prior to your closing up? A. No, I didn't.

Q. Who is Wattlin & Renn? A. Insurance agents.

Q. On March the 9th you wrote a check for \$20,000 to Electronic Cabinets, Inc.? A. Right.

Q. What was the purpose of that check? A. Repayment of a loan.

Q. To Electronic Cabinets? [14] A. Electronic Cabinets, Inc., right.

Q. What were the assets of Electronic Cabinets, Inc., at that time? A. It is dissolved. It was a corporation that was merely set up to—well, I have to give you the history.

Q. Go ahead. A. Electronic Cabinets, Inc. was originally formed by me in New York to do engineering work and sales work in the sheet metal or cabinet business. That led to my contact with Oakland because Oakland I had employed as a subcontractor basically to do this work for Electronic Cabinets, Inc. Then when I saw that Oakland was in the shape that it was in in '67, and having already committed a lot of my products of Electronic Cabinets, Inc., that led to the purchase of Oakland. That is why Electronic Cabinets, Inc. bought Oakland, so that Electronic Cabinets, Inc., its only asset was Oakland.

Q. What happened to the \$20,000? A. Electronic Cabinets, Inc. paid it back as a loan to Brede Company. Electronic Cabinets was borrowing money from Brede Company.

Q. What is left of Brede Company? A. Nothing now.

Q. What happened to the \$20,000 that went back to [15] Brede Company? A. It got paid out probably for my salary because I never, in the four years that I owned Oakland, I never drew any salary from Oakland.

Q. I think we started before but maybe I didn't—who are the shareholders in Brede Company? A. Primarily myself, I believe my wife has a small portion. I think she has one share, two shares, something like this.

Q. And you two also own Electronic Cabinets? A. Right.

Q. The same directors of both companies? A. In all cases my wife and I are directors and I don't recall who the third

director was. That is in all cases except Oakland. My wife was not a director of Oakland.

Q. Has Brede Company been dissolved yet? A. Yes, yes. It had to be. There was nothing left there, either.

Q. And Electronic Cabinets, Inc., these are petitions that were filed, I guess, with the Secretary of State in New York dissolving the corporation? A. Yes, that is right.

Q. And there is nothing left of Electronic Cabinets, Inc.? [16] A. No.

Q. When you dissolved these companies, apparently these were only paper companies? Is that correct? A. I don't know what you mean by a paper company.

Q. What kind of assets were distributed at the time of dissolution? A. There was nothing in Electronic Cabinets, Inc., because, like I say, its only assets was the Oakland Company and in Brede Company I don't recall, five, six thousand dollars, something like this. I don't recall exactly.

Q. You, personally—I think you testified before that you personally took the \$20,000 as salary? A. I transferred it from Electronic Cabinets to Brede Company and Brede Company was paying my salary regularly up until July when Brede Company was dissolved. It was not taken in a lump sum.

Q. Had you been drawing a salary before that time? A. Oh, yes, from Brede Company all the way?

Q. How much were you drawing? A. I believe it was 24,000 a year—two thousand a month.

Q. What did Brede Company do? A. Engineering representatives.

Q. Who did you represent? [17] A. Various companies in the electronics field.

Q. Why did that go out of business? A. Mostly because I guess I was devoting full time at the end here at Oakland trying to save Oakland and the defense industry in New York was on its way out.

Q. Are you presently employed? A. No.

Q. What is your source of income? A. What money I have left.

Q. Do you have a savings account? A. No savings account.

Q. Checking account? A. Checking account, yes.

Q. Approximately what is the balance of that as of today? A. Oh, I don't know. I think total cash available to me right now is about five, six thousand dollars, something like this, if I recall right. I know it is fast dwindling.

Q. You stated that you own a home with a first and second mortgage on it. What is the approximate value of that house? A. It has been sold.

Q. Was the First National Bank of Glenhead satisfied to the balance of the second mortgage? [18] A. Yes, I satisfied them out of Brede Company funds so I could get the mortgage off the house so I could sell the house and not lose that.

See, basically the Brede Company had been, I guess you might say, inactive for, oh, possibly nine months or so—nine months or a year previous to the bankruptcy of Oakland and it was imperative that the last six to nine months that I get Oakland on its feet in order to be able to continue an income.

Q. Was engineering representatives—how did the two companies interrelate? What happened to these product lines that you were representing while you were trying? A. I lost the lines and basically didn't have the lines after, I don't know, July of '70, I guess, somewhere in there.

Q. Are you and your wife living in an apartment now, then? A. No, we are still living at the house but we will be getting

out real soon. When I sold it I sold it with the provision that I could live there for awhile.

Q. Who did you sell it to? A. A construction company in Oyster Bay, Pulmatuck, something like that.

[19] Q. Are they all related to you—family ties? A. No family ties.

Q. Do you have an automobile? A. I had but I sold that now and I am currently leasing a car.

Q. What would you say the value of your household goods and chattels are? A. Somewhere around two thousand, twenty-five hundred dollars, I guess.

Q. Do you have any other stocks or bonds other than—
A. No.

Q. Did you ever own any stock other than Brede Company, Electronic Cabinets and Oakland Foundry? A. Possibly from time to time a few years back I may have bought and sold some stock on the stock market but I hadn't done any of that in the last three years.

Q. Other than these items that we have mentioned here, this bank account with about five or six thousand dollars and the household goods, do you have any other assets? A. Life insurance policy, I believe has a cash surrender value of somewhere around \$4,000.

Q. Does your wife have any assets other than the ones we have mentioned? [20] A. No, no, my wife is strictly a housewife, has been for years.

Q. There haven't been any transfers of anything from you to her within the last few years? A. No.

Q. You said you weren't drawing any funds from Oakland Foundry, I have been going through copies of the statements and it appears that checks made payable to you— A. Expense checks for basically living expenses out here when I came

out. As a matter of fact, in the early years not only did I pay my salary out of Brede Company but I didn't even charge much in the way of expenses to Oakland. It was only the last two or three months before the bankruptcy that I began taking the living expenses from Oakland.

Q. You are talking about three hundred dollars a week? A. I thought it was more like three hundred every couple of weeks but I don't recall exactly.

Q. Did you receive any inventory or shipments of merchandise and goods after the first of June? A. Did I receive any after the first of June?

Q. Right. A. I may have, I don't know.

[21] Q. Who is Marvel Industries? A. Marvel, they make a refrigerator.

Q. Did they start shipping to you on cash only? A. Yes, a lot of them put us on a cash basis towards the end, there.

Q. I note that in July you paid American Express \$2521, any particular reason you selected American Express to pay them off? A. No, no, that was basically traveling expenses. That was basically the traveling expenses of Groesch and myself on the last trip to Hawaii, to try and get paid on this McMullen job that you said earlier he had offset that. He shouldn't. That isn't right.

Q. As long as we are talking about that, we wrote Mr. McMullen a letter asking him for the—how much do they owe you? Do you remember? A. Yes. You said earlier 30,000. My recollection is more like 21,000 or 22,000.

Q. Right, 21,500. This is a response that we received from him. I would like you to—it is a letter dated September 3rd, 1971 from Robert McMullen and Sons signed by Jerry Lee Holt, comptroller, in which he more or less claims he doesn't owe you anything. I would like you to read that letter and let us have your comments. [22] A. The reason why he turns it out

this way is he is still holding onto this ten percent retention and he has no right to hold onto that ten percent retention because that contract was written and negotiated by me and that ten percent retention was due when we delivered all of the cabinets to him, not when he finished installing all of the cabinets and collected his money from Hickham Air Force Base, so he is wrongfully holding \$15,000. Credit to 193.80, I don't know about that unless that is something on a couple cabinets he back-charged for repainting defective cabinets, you know, just in doing that.

Actually the second trip that I made to Hawaii with Groesch was basically to go out there to get him straightened out as to how to install the cabinets which was not my job at all. We just sold the material to him. I went out there to try and teach him how to put them in so that we could get paid.

Backcharge for repainting defective cabinets, yes. His workmen were scratching them up and he was claiming they were shipped that way which they weren't. The \$4,000 mentioned here is a commission to the people that we used out there, Maxwell——

Q. Is that a result of a garnishment? A. Yes, they put a garnishment on the job.

[23] Q. Was that within the last four months or four months prior to July 15th? A. I don't know. I don't honestly remember when. It would be somewhere around March or April, I suppose; I don't know.

Q. This \$10,000—\$15,000 retention that he is holding on —— A. Right, that is due and payable now. It is due and payable as of six months ago whenever the job was finished.

Q. Is he claiming any rights against this money assuming that he is correct that the money is not really due until the job is completed, does he claim that \$15,000? A. I don't understand.

Q. Or make any claim—you were telling me the reason he hasn't paid the \$15,000 over is because he claims it is not due and owing until the job is completed? A. Right.

Q. You stated that the money under the terms and conditions of the contract—I don't have a copy of the contract, was due at the time of delivery? A. Right.

Q. What I want to know, do you know if he will make any claim to any part of that \$15,486 at the end of the [24] period when the job is completed? A. He says in his letter that he has completed seventy percent of the installation so you can probably scratch up the other thirty percent of the cabinets and add up some more damages on it for defective cabinets.

Q. Was there anything in the agreement—and where could I find a copy of the agreement? A. Yes, there should be one at the plant.

Q. Where would that be located? A. In the files.

Q. Which set of file cabinets? I am fairly familiar with the cabinets. A. I don't know, the girls did—

Q. Would it be under this Robert McMullen account? A. Yes.

Q. Was there anything in the contract, to your knowledge, as to the right of inspection—when the materials were to be inspected if there were any claims for damage? A. Yes, there was a clause in there that he had to inspect the material within thirty days and then he had—no, within five days, I guess it was, and then he had to pay within forty-five days, I believe.

Q. Apparently this inspection of this backcharge for [25] defective cabinets would be—he violated the forty-five day provision? A. Yes.

Q. He didn't make the claim within forty-five days? A. No, he just accepted them and stored them in the warehouse and he made no inspection in forty-five days, as far as I can tell. I

don't know what his intentions was. Maybe his intentions was just to spot check. I don't know whether it was to do that one hundred percent. I know we inspected one hundred percent at the plant and shipped them and the cabinets were all good.

Q. He has got a reserve for garnishment and McMullen's attorneys' fees. A. Yes, he was holding some—I don't know, \$60,000 or something that was due us and we had to let this guy—I had to give him authorization for this garnishment thing in order to get some money in order to keep the thing going.

Q. Who was it that made the garnishment? Who was it that garnished McMullen? A. Maxwell and Baldwin, as it says in the letter.

Q. Where are they from? A. Hawaii.

Q. It says there was a default judgment. Did you [26] let a default judgment be taken against the company? A. No, I don't know about that.

Q. Did the company ever receive summons? Do you remember a lawsuit ever being filed against you? A. I don't remember, it may. I don't remember. Seems to me there was some correspondence about the action in Hawaii but I don't remember exactly what it was, now.

Q. What part of Hawaii is that? A. In Honolulu—near Honolulu. I don't know if it is in the city limits of Honolulu, but just outside—but Hickham Air Force Base is really where the work was being done.

Q. Did you owe the money to Maxwell and Baldwin? A. It was a commission that—yes, that become due to Maxwell and Baldwin when the payments were in.

Q. What was the total value of this contract? A. I know it was in excess of \$100,000. I don't remember whether it was 125 or 130 or what. If I had records in front of me I could answer these questions a lot better but in the absence of records, it is hard.

Q. Does this Robert McMullen—is there a bond involved with this? Do you remember? Is this a federal government job?

A. Yes, yes, it was Hickham Air Force Base. The [27] contract was with Hickham Air Force Base, right.

Q. When was delivery of this stuff made? Would that have been within the last year? A. Yes, seems to me we started deliveries in about October—September, October. We completed deliveries in about January or February, I believe—March, possibly.

Q. Of this—— A. This past March, right.

Q. Did you ever notify the bonding company—— A. There was no bond involved.

Q. Of any contract with the government there has got to be a bond. A. Yes, he had the file.

Q. Did you ever notify his bonding company of his failure to comply? A. No, I didn't.

Q. Is this a pretty large contractor, financially responsible, in your opinion? A. In my opinion he should be financially responsible, yes. In my opinion Cornell should be very financially responsible, too. Neither one of them—well, I won't——

Q. There was a problem with Jefferson Construction Company? [28] Yes, this was someone else who withheld——

Q. About \$750. A. Yes, he withheld payment, I think, of 11,000 or something like that—11,750 and then finally—he had ordered kitchens to be made by a certain date. As a matter of fact, God, we even worked overtime to get them done by a certain date and then come that date he didn't need them for another month. He didn't need them for another month. After three months of this I said, "We have to ship these things and get paid."

We shipped them and he said he would make the payment of \$11,000. I don't know what he called it, a prepayment or on

account payment, something like that, then the other 750 never did come. That is why he was rebilled for some \$750.

Q. I am sorry; I want to refer back to this McMullen thing once more. What was the name of the job down in Hawaii?

A. We just called it the Hickham Air Force Base job. It has, I believe, a job number. Most of those federal jobs do.

Q. What was this to do, to bill—what were they building barracks or something? A. McMullen had a contract with the air force to basically refurbish about three hundred, four hundred houses, and he, in turn, bought the cabinets from us to install—to install in these house. He had other work, too. He had to do painting and he had to do Formica tops on them and various other repairs in the kitchens.

In other words, he was refurbishing the cabinets of some three, four hundred houses. This resulted in his ordering some four thousand cabinets from us—in that range.

Q. You scheduled some secured debts, one of which is from the Factoring Company in New York on your equipment and machinery. Do you know the fair market value or would you have an idea as to the actual value of that equipment that was secured to them? A. I believe in the bankruptcy schedule they said \$75,000 however, it wouldn't surprise me if it was worth more than that.

Q. Did you ever have an independent appraisal made of these goods? A. Not one that I felt was really complete and worth anything.

Q. Mr. Brede, let me ask you, what is your opinion based on, then, that the value of the equipment, machinery, I guess office equipment, is worth more than seventy or more now? [30] A. Once more—probably I, myself, am not qualified to give any kind of a value as to it but what I did do was—what I can do, I can go out and check it out what it cost me to buy things like that. When I do that I can look at what is in that plant. I can add up numbers. When I add up those, I come up—

Q. Are you talking about replacement or are you talking about used equipment? A. Buying used equipment, right.

Q. Is there a good market for used equipment—that type of equipment, fairly broad market? A. I wouldn't know. I wouldn't know. I would say there was. I really wouldn't know.

Q. The St. Clair National Bank held a real estate mortgage? A. Right.

Q. Do you know the approximate balance due and owing on this? A. Yes, 110,000—110,000 was the principal and the principal had been prepaid until—I don't know, August of '72 or something like this. I don't recall the exact date and as we were discussing there earlier, the payments on the interest were paid right up until last May or June, July, somewhere in there.

Q. So, there would be the interest payments from [31] June to date as well as—who took care of the real estate taxes? A. I suppose I did.

Q. I mean, did you pay the——A. Well, the girls would make out all these checks when they came due.

Q. Was the mortgagee to pay the real estate taxes or was Oakland Foundry to pay the real estate taxes? A. Oakland Foundry.

Q. Do you know whether or not they were paid? A. No. We got to talking about that, too. As far as I can see now, counting this last bunch that were just due in July and September, they should be that plus one other year that has not been paid.

Q. Approximately what are the real estate taxes? A. Seven thousand, I believe, a year—seventy-two hundred a year, something like this.

Q. You entered into an arrangement with the SBA for a loan of how much? A. 250,000.

Q. And approximately what is the value—the balance on that loan? A. 215 or 19, something like that.

Q. As security you gave real estate—second mortgage on a real estate? [32] A. Yes. I believe they had a second mortgage on the real estate, first on the machinery—no, sorry; second on the real estate, first on the inventory and second on the machinery.

Q. Was there anything at the time that you were negotiating with SBA—were you negotiating on the basis of opening up another plant in East St. Louis? A. Yes.

Q. What were the particulars of that plant? A. That was supposed to be a long range thing when they were supposed to run some kind of a school down there and they were supposed to train some people down there and then after they trained them eventually I was supposed to employ them down there and the whole thing fell apart. The school never got opened. The thing just fell apart.

Q. Were you supposed to have some kind of plant down there for them? A. I was supposed to set up a little training area, yes, which I did. I had all the plans made for it to be set up but actually the person that sublet that part of the building to me never did even get it cleaned out so nothing ever happened.

Q. The Commercial Trading Company, that is the mortgagee of the equipment, do you owe them approximately [33] \$4,000? A. I was under the impression it was more like 33 or 35,000. I don't recall, though, exactly.

Q. Did you execute the documents? A. Yes.

Q. Did you execute all three of the instruments here, the first mortgage on the building, the first mortgage to SBA and also— A. Yes, I did.

Q. Mr. Brede, what is your best estimate of what a forced sale of the inventory would bring? A. A forced sale?

Q. Yes, at an auction sale, or can you really make any estimate at all? A. It is a difficult thing.

Q. What percentage of the inventory left is completed—goods and merchandise ready for shipment? A. I would say there is very little of the inventory that would be so-called work in process. I would say that the inventory would either be finished goods or materials, parts and supplies done. That is all I have right now.

The Referee: Mr. Heiligenstein?

Mr. Heiligenstein: Thank you.

[34] Questions by Mr. Heiligenstein:

Q. You say that you have a life insurance policy with a \$4,000 cash value? A. Yes.

Q. Was that policy pledged for any of these? A. No. Actually that was the life insurance that went along with the mortgage on the house.

Q. What company is that, sir? A. That was Equitable.

Q. Do you still have that policy in full force? A. Yes.

Q. Are you attempting now to cash it in to get the 4,000? A. I probably will, yes.

Q. Have you started to do that? A. Yes, I have.

Q. Who with? A. You just send a notice and said this is a cash in value and I signed it and sent it back to them.

Q. What agent from Equitable did that, sir? A. I don't know, just the Long Island office of Equitable.

Q. How long ago did you do that? A. Beg your pardon?

Q. How long ago did you start the process to get— [35]
A. Recently, the last week or two.

Q. What is the face value of the policy? A. I don't know the answers to these questions because it was a policy that was with—it was part of the mortgage and somehow or another it was a policy that I believe, if I recall rightly, if anything happened to me my wife would have the house free and clear, something like this—typical Equitable mortgage policy.

Q. So, you are expecting about \$4,000 in cash, I take it, from that? A. Right.

Q. And your checking account has got about a five thousand dollar present balance? A. I don't know. I would have to look all these things up to see.

Q. You testified previously it was between five and six. A. Yes.

Q. Is that correct? A. Yes, I guess. You have got me here without records.

Q. In what bank is that money? A. First National of Glenhead.

Q. Who are the persons who have the joint account, between you and your wife? [36] A. Right.

Q. And your wife's name? A. Betty D.

Q. Are there any other cash assets in addition to the checking account and the life insurance cash proceeds that you are attempting to collect? A. No.

Q. On this copy of this mortgage to St. Clair National Bank, who is the person that signed? A. Secretary of the corporation at that time, Sylvia Castle. She was an employee. She left the employ, I guess, two years ago, something like that.

Q. Would the life insurance policy with Equitable be in the amount of \$100,000? A. No, no, there was—I don't know, thirty-five or forty thousand dollar mortgage on the house. As I said, it was a policy that was tied into the mortgage on the house.

Q. When you took out this loan with the SBA, you individually signed it and guaranteed an assignment of life insurance on your life in the amount of \$100,000? A. Not that I know of.

Q. Not that you know of? A. No. Oh, wait a minute; that is—yes, that was another policy that was taken out. I know the one [37] you are referring to now. That was another policy that was taken out here in Belleville with some company in—I don't know, down in Kansas or somewhere, wherever the company was. That was a policy on my life for \$100,000 or I think it was later modified to 50,000 which Oakland took out and paid on my life which was paid by Oakland; I am sorry.

Q. Who has possession of this policy? A. That policy was one of the things that came up for renewal about the time of the bankruptcy and that is one of the things we defaulted on. I never renewed it. I never saw that policy. I assume it is held by SBA or something. I never saw that policy.

Q. Do you know whether or not there is any cash surrender value in that policy? A. No. I imagine that was a premium of a thousand or two thousand dollars a year or something. It was paid once and as far as I know it was just term insurance.

Q. You also gave the SBA an assignment of a lease. What did you assign, sir? A. Assignment of a lease?

Q. As additional security. A. Oh, wait, that was the property in East St. Louis. That was at the time leased by us to do this [38] work and the work never got done and the whole thing fell apart. It was a sublease, actually, if I recall right.

Mr. Heilingstein: That is all for the moment, Your Honor.

The Referee: Mr. Lowery?

Questions by Mr. Lowery:

Q. Mr. Brede, according to the schedule that has been filed, the last tax returns filed were for the year 1969? Would that

be correct? A. Yes. I get confused on this business out here because it seems you are paying one year behind that.

Q. I am talking about income tax returns. A. Oh, income tax returns? Yes, the last one we filed on Oakland was the 1969 return which was filed January 1st.

Q. And you did not file a return for 1970? A. No, this last one has not been filed. That is right.

Q. Would that return have shown a loss? A. Oh, yes.

Q. When did the company cease operations? A. Somewhere around July 15th—July 4th, somewhere in there.

[39] Q. Have all wages of the employees been paid? A. Yes, all wages have been paid.

Q. All withholding taxes? A. Yes.

Q. How about vacation pay? A. Vacation pay had not been paid.

Q. Do you know what that amounts to? A. I think we had an accrual of about—oh, possibly three thousand dollars, somewhere in that range.

Q. Are there any commissions due and payable? A. Yes. There was an accrual for that, too, in the general order probably of five, seven thousand dollars, somewhere in there.

Q. Would those be commissions due and payable to yourself? A. No, to the manufacturer's representatives across the country that we used.

Q. Would the commissions be for services rendered more than four months prior to July 15th? A. The services rendered more than four months prior?

Q. July 15th. A. It would probably be some there and some right up until the date that we ceased.

Q. What do the commissions amount to, approxi- [40]
mately \$8,000? A. Yes. I was under the impression—I said
five to seven. It is somewhere in that range.

Q. Was the majority of the commissions due on one or two
accounts? A. Well, the biggest part of the commission was
Maxwell and Baldwin that you covered earlier and I don't re-
call.

Q. How about on the Hawaii job? A. That was \$4,000 that
you mentioned earlier.

Q. When was the loan made to the SBA? A. It has been
in effect approximately a year and——

Q. What were the proceeds used for? A. Basically operation
of the plant.

Q. Were there any improvements made to the real estate in
Belleville with the loan? A. I don't recall exactly.

Q. Is the property presently insured—real estate? A. It was
up until the time of the bankruptcy and I don't know what has
happened since then.

Mr. Lowery: I have no other questions, Mr. Referee.

The Referee: Anyone else?

[41] Further Questions by Mr. Kunin:

Q. Mr. Brede, the Rapp Distributing Company, you have
accounts receivable \$1980? A. Right.

Q. Is there any offset that you owe him for any commissions
or anything? A. I don't know, but if there is it is a couple hun-
dred dollars or so. He definitely does owe us money.

Q. Also who in the area would be familiar with the inven-
tory so that when an appraisal is made of the inventory they
could go around and explain it to the appraiser what is in each
of these different areas? A. You mean who could identify it?

Q. Right. A. I suppose Mel Schinzing.

Q. How do you spell that? A. You got me—S-c-h-i-n-z-i-n-g, I guess, something like that. Cliff Hommel knows him. He is in the area. In other words, Cliff probably knows the inventory, too.

Q. I am really interested in if we have an appraisal made by an independent appraiser the appraiser is not going to open all the boxes. If we have some man that goes around with him and tells him what is in each box—— [42] A. Your best bet would probably be Mel.

Q. Is there someone else in the event he can't handle this? A. The other person would be one of the girls. I don't know if they are still in the area or not, to be honest. I don't know if they are in the area or not.

Q. Who would that be? A. Nancy moved out of the area, didn't she? And the girls wouldn't know the inventory, anyway. Your best bet would be Mel Schinzing.

Mr. Kunin: I have no further questions.

The Referee: Mr. Sanders?

Mr. Sanders: Yes, just one.

Questions by Mr. Sanders:

Q. In response to a question by Mr. Kunin as to the amount of money you had in the bank, you indicated that there was somewhere around five thousand dollars available to you. Were you including the cash surrender—— A. I may have been including the cash surrender of the life insurance. I don't know. I would have to set down and check it out to be sure, Larry.

Mr. Sanders: That is all I have.

The Referee: Any other creditors have any ques- [43] tions? Anything else to come before the Court? Do you have any other witnesses?

Mr. Kunin: No other witnesses.

The Referee: Do you want a continuance on this?

(Discussion off the record)

The Referee: Let the record show this hearing will be continued until October 19, 1971, at ten A.M.

[44] I, Jennie R. Connolly, a Certified Shorthand Reporter and Notary Public, do hereby certify that I reported in shorthand the proceedings had in the matter of Oakland Foundry Company of Belleville, Illinois, Inc., pending in the United States District Court for the Eastern District of Illinois, Bankruptcy Division, on the 12th day of October, 1971, and thereafter caused to be transcribed into typewriting the foregoing transcript which I hereby certify is a true and correct transcript of the evidence offered and received in said cause before the Honorable James Trabue, Referee of said Court.

(S) JENNIE R. CONNOLLY

State of Illinois }
County of St. Clair } ss.

I, Henry P. Keefe, Do Hereby Certify that the foregoing is a true and correct copy of the original transcript of the proceedings in the matter of Oakland Foundry Company of Belleville, Illinois, Inc., taken on October 12, 1971.

In Witness Whereof, I have hereunto set my hand and affixed my Notarial Seal on this 22nd day of May, 1975.

/s/ HENRY P. KEEFE

Notary Public

Certified Shorthand Reporter

My Commission expires December 27, 1976.
